# TRANSCRIPT OF RECORD

# Supreme Court of the United States

OCTOBER TERM, 1955

## No. 621

MARTHA C. REED, PETITIONER,

*vs.*

PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 11, 1956

CERTIORARI GRANTED FEBRUARY 27, 1956

# SUPREME COURT OF THE UNITED STATES

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## INDEX



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# APPENDIX

## RELEVANT DOCKET ENTRIES.

July 23, 1953. Comp. Filed.
July 23, 1953. Pltff. demand jury trial filed.
July 23, 1953. Summons exit.
July 30, 1953. Appearance for Philip Price for Defendant filed.
Aug. 4 1953. Summons ret. on July 29, 53 served and filed.
Aug. 18, 1953. Answer filed.
Aug. 27, 1953. Order to place on trial list filed.
Oct. 28, 1953. Pltff. interrog. filed.
Oct. 30, 1953. Def. objections to interrog. filed.
Oct. 30, 1953. Order to place case on Argum, list.
Nov. 16, 1953. Pltff. supplemental interrog. to defendant filed.
Nov. 23, 1953. Argued sur defendant's objections to interrog.
Eo Die: The court rules on the object to interrog. (order) K.
Jan. 5, 1954. Order sur objections to plaintiff's interrog. filed (K) 1/6/54 noted and mailed.
Jan. 20, 1954. Answers to plaintiff's interrog. and supple. interrog. filed.
Jan. 5, 1955. Pre-trial deposition of pltff. filed.
Jan. 5, 1955. Defendant's motion to dismiss and notice of motion filed.
Jan. 5, 1955. Order to place case on argument list filed.
Feb. 28, 1955. Argued sur defendant's motion to dismiss WHK CAV.
Mar. 17, 1955. Opinion granting motion to dismiss filed (WHK).

Mar. 17, 1955. Judgment dismissing action filed 3/18/55 noted and notice mailed.
Mar. 21, 1955. Plaintiff's notice of appeal filed.
Mar. 21, 1955. Copy of clerk's notice to U. S. Ct. of Appeals, filed.
Mar. 23, 1955. Defendant's bill of costs, filed.
Apr. 11, 1955. Record transmitted to U. S. Ct. of Appeals.

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## COMPLAINT.

The plaintiff is Martha C. Reed, a resident and citizen of Paoli, Pennsylvania, who claims of the defendant herein the sum of Thirty-six thousand two hundred dollars ($36,200.00), upon a cause of action whereof the foliowing is a statem nt:

1. This action arises under the Act of Congress, April 22, 1908, c. 149, 35 Stat. 65, and amendments thereto, U. S. C. A., Title 45, Sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685—1st Session of the 76th Congress, known and cited as "The Federal Employers' Liability Act," and under the Safety Appliance Acts, Title 45, U. S. C. A., Sec. 1-23 inclusive.

2. The defendant herein is Pennsylvania Railroad Company, a corporation, which was at all times herein mentioned and now is a railroad corporation duly organized under and existing by virtue of the laws of the State of Pennsylvania. The said corporation is a citizen of that

state and is authorized to and does business in the Eastern District of Pennsylvania.

3. At the time and place hereinafter mentioned, and for a long time prior thereto, the defendant, as a common carrier, operated, by electric and steam power, trains carrying passengers, freight, express packages, baggage and foreign and domestic mail in commerce between the different states of the United States and its territories.

4. At the time and place hereinafter mentioned the plaintiff's duties, in whole or in part, were in furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce; also at the said time and place the defendant was engaged in interstate commerce between the different states of the United States or its territories, or in foreign commerce.

5. At the time and place hereinafter mentioned, the acts of omission and commission causing the injury to the plaintiff were done by the agents, servants or employees of the defendant, acting in the course and scope of their employment with and under the direct and exclusive control of the defendant, and were due in no manner whatsoever to any act or failure to act on the part of the plaintiff herein mentioned.

6. All the equipment, property and operations involved in the accident hereinafter referred to were owned by and under the direct and exclusive control of the defendant, its servants, agents or employees.

7. As a result of the accident herein referred to, the plaintiff has been obliged to expend, in and about an effort to cure himself of the pains and ills hereinafter more particularly set forth, various and divers sums of

money for medicine and medical treatment, and will be obliged to continue to expend such sums for an indefinite time in the future, to his great detriment and loss.

8. Because of the accident herein referred to, the plaintiff has undergone great physical pain and mental anguish and will continue to endure same for an indefinite time in the future, to his great detriment and loss.

9. Because of the accident herein referred to, the plaintiff has been unable to attend to his usual and daily duties, occupations and labors, to his great detriment and loss.

10. As a result of the accident herein referred to, the plaintiff has suffered a loss and depreciation of his earnings and earning power and will continue to suffer such loss and depreciation for an indefinite time in the future, to his great detriment and loss.

11. The accident herein referred to was caused solely and exclusively by the negligence of the defendant, its servants, agents or employees.

12. On or about July 19, 1951, and for some time prior thereto, the plaintiff was employed by the defendant as a print-maker in the defendant's Thirty-second Street Building in Philadelphia, when due to the negligence of the defendant in permitting a window to remain cracked and unrepaired, the said window fell in upon the plaintiff causing the injuries more particularly hereinafter set forth.

13. As a result of the negligence of the defendant as aforesaid, the plaintiff suffered a laceration of the right

hand involving the nerves, tendons and muscles, requiring ten stitches, a laceration of the right arm involving the nerves, tendons and muscles, requiring seven stitches, a severe bruise under the right breast, and injury to her nerves and nervous system, some or all of which plaintiff is advised are or may be permanent.

RICHTER, LORD & FARAGE
By JOSEPH S. LORD III,
Counsel for Plaintiff

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## ANSWER OF DEFENDANT TO COMPLAINT.

Defendant, The Pennsylvania Railroad Company, in answer to the complaint in the above case avers:

### First Defense

1. Denied.

2. Admitted.

3. Defendant admits that at the time set forth, and for a long time prior thereto, the defendant, as a common carrier, operated, by electric and steam power, trains carrying passengers, freight, express packages, baggage and foreign and domestic mail in commerce between the different states of the United States and its territories. The remaining allegations of paragraph 3 are denied.

4, 5. Denied.

6. Defendant admits that all the equipment and property involved in the accident hereinafter referred to were owned by and under the direct and exclusive control of the defendant, its servants, agents or employees. The remaining allegations of paragraph 6 are denied.

7, 8, 9, 10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 7, 8, 9 and 10 of the complaint.

11. Denied.

12. Defendant admits that on or about July 19, 1951, and for some time prior thereto, the plaintiff was employed by the defendant as a print-maker in the defendant's Thirty-second Street Building in Philadelphia. The remaining allegations of paragraph 12 are denied.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the complaint.

Second Defense

14. If plaintiff was injured at the time and place alleged in the complaint, defendant, The Pennsylvania Railroad Company, avers that the sole and proximate cause of the plaintiff's injuries was plaintiff's negligence.

Third Defense

15. This Court has no jurisdiction over the subject matter of this case.

WHEREFORE, defendant, The Pennsylvania Railroad Company, requests that the complaint against it be dismissed.

/s/ PHILIP PRICE
PHILIP PRICE
Attorney for defendant

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## PLAINTIFF'S INTERROGATORIES.

Martha C. Reed, the plaintiff in the above action, by her attorneys, Richter, Lord & Farage, Esquires, hereby makes demand that the defendant or its counsel answer the following interrogatories under oath, pursuant to Rule No. 33. These interrogatories shall be deemed continuing, so as to require supplemental answers if defendant obtains further information between the time answers are served and the time of trial:

1. Did defendant obtain from plaintiff a statement of the accident occurring on or about July 19, 1951, as a result of which he suffered personal injuries?

2. Does the statement contain facts concerning the manner, place, time or cause of the happening of the accident, or concerning the nature and extent of plaintiff's injuries therefrom? If so, state where, when, and by whom such statement was obtained, giving addresses of all parties named and indicate where and in whose possession such statement is now.

*Plaintiff's Interrogatories*

3. State when this accident first came to the attention of the defendant, by whom it was reported and to whom.

4. Has the defendant at any time received any medical reports, X-ray reports, etc., from any hospitals or physicians reporting on the injuries sustained by plaintiff in the accident upon which this action is based? If so, state when, where and from whom the defendant received any such reports, indicating the nature thereof (i. e., medical report, hospital report, etc.), and state the present whereabouts of such reports and the name and an address of whosoever is in possession or custody thereof. Indicate the names of the company doctors, if any, who attended plaintiff, the dates and places of such treatment, and the nature of the treatment.

5. State:

(a) Whether or not defendant has any information that the injuries, loss of earnings and/or damages alleged to have been suffered by the plaintiff in this accident, were actually the result of a prior or subsequent injury sustained in a prior or subsequent accident, or the result of disease, sickness or other causes or conditions;

(b) If so, state whether or not defendant has received any statements, oral or written, from any persons, concerning same;

(c) If defendant's answer to part (b) is in the affirmative, state where, when, by whom and from whom such statements were obtained (giving addresses of all parties named), and state the present whereabouts of these statements, giving the name and address of whosoever is in possession or custody thereof.

6. Has the defendant at any time obtained a statement or statements concerning the accident involved in this case from any of its employees or third parties?

7. If the answer to the preceding interrogatory is in the affirmative, state:

(a) The names and addresses of any person or persons from whom such statements were obtained;

(b) The name of each person taking such statement or statements;

(c) The date or dates such statement or statements were taken;

(d) Whether the statement or statements contain facts concerning the manner, place, time or cause of the happening of the accident, or concerning the nature of the plaintiff's injuries therefrom;

(e) The present whereabouts of the said statements and the name and address of whosoever is in possession or custody thereof.

8. Is the defendant in possession of any photographs of the window involved in this accident, the locale or surrounding area of the site of the accident, or any other matters or things involved in this accident?

9. If defendant's answer to the preceding interrogatory is in the affirmative, state:

(a) The date or dates when such photographs were taken;

(b) The name and address of the party taking them;

(c) Where they were taken;

(d) The object or objects or subjects or the particular site or view which each photograph represents;

(e) The present whereabouts of the photographs and the name and address of whosoever is in possession or custody thereof.

10. List the names and addresses, if known, of any persons who defendant knows or believes were witnesses within sight or hearing of the accident, other than those whose names are disclosed by answers to preceding interrogatories as having given statements.

11. State the names and addresses of plaintiff's supervisors, if any, at the time of the accident.

12. State the names, addresses and job classifications of plaintiff's fellow crew or gang workers, if any, who were working with the plaintiff at the time of the accident. State where each stood in relation to the plaintiff, what each was doing at the time of the accident and what part, if any, each played in the event.

13. State the rate of pay which plaintiff was earning at the time of the injury, and indicate whether the rate of pay for the work which the plaintiff did at the time of the injury has been since increased. If so, state the amount of increase and when it occurred.

14. According to defendant's records, has the plaintiff worked since the accident? If so, indicate whether such work is the same as that done before the accident. If not,

specify the type of work done since the accident and the rate of pay therefor.

15. According to defendant's records, how much time from work has plaintiff lost since this accident; computed up to the date of your answer.

16. State the total of plaintiff's earnings, according to defendant's records, for the year in which she was hurt, indicating the amount earned before and the amount earned after the injury.

17. State how much plaintiff's earnings were, according to defendant's records, for each of the two full years preceding the year of her accident.

18. According to defendant's records, how many days was plaintiff absent from work:

(a) In the year of her accident and prior to said accident;

(b) In the two full years prior to the year of the accident (except absences for holidays, vacations, layoffs, furloughs, and Sundays or relief days);

(c) Do your records indicate any reason or explanation for any of such absences, other than those excepted? If so, please indicate.

19. State whether and how often periodic inspections or examinations were made of the window involved in this accident.

20. If such inspections or examinations were made, state when and by whom the inspection was made last

preceding the accident and first following the accident, and whether such inspections disclosed any defect, inadequacy, or condition of disrepair, and if so, the nature thereof.

21. If records or memoranda were made of such inspections or examinations, state where and when and the name and address of the parties making such records or memoranda, the present whereabouts of the memoranda and the name and address of whosoever is in possession or custody of these records or memoranda, as respects these particular inspections or examinations.

22. When was the window involved in this accident repaired following said accident? (a) State the nature and extent of such repairs and by whom they were made.

23. Was the window involved in this accident ever repaired prior to the said accident? If so, state:

(a) The date of the said repairs;

(b) The nature and extent of such repairs;

(c) The names and addresses of those who made the repairs;

(d) If written records were made of such repairs, state by whom said records were made and the present location of copies of said records.

24. What was the location of the window involved in this accident?

25. Was the window involved herein cracked before the accident?

26. If the answer to the preceding interrogatory is in the affirmative, state for how long the window had been so cracked.

27. If the answer to Interrogatory No. 25 is in the affirmative, describe the said crack, giving its length, direction and location with reference to the sides, top and bottom of the window frame.

28. Describe the window involved in this accident, including in your description the dimensions of the window and the general type of window sash (e. g., vertical, sliding, casement, etc.) and number of panes in the window, etc.

29. State whether there was at or about the time of this accident a wind storm, rain storm, hailstorm or other type of weather condition involving strong winds. Specify what type of weather conditions involving strong winds, if any, occurred.

30. If the answer to the preceding interrogatory is in the affirmative, state whether any other windows in defendant's 32nd Street building were broken at or about the same time as the window involved herein. If so, specify the number and location of said windows.

31. If the answer to the preceding interrogatory is in the affirmative, state whether the other such windows which were broken at or about the same time as the window involved herein had also been cracked prior to the time of their breaking.

32. What was the general type of work being done in the department where plaintiff was employed at the time of this accident?

33. What specific work was assigned to the plaintiff at all times involved herein?

34. If the work done in the department wherein plaintiff was employed involved the making and/or handling of blueprints, state what kind of blueprints:

(a) If the blueprints inquired about were blueprints of railroad cars or parts of cars, state the general types of car of which this department made and/or handled blueprints;

(b) If this department made and/or handled blueprints of other items or structures than cars, specify what other types of blueprints were so made and/or handled.

35. If this department made and/or handled blueprints of cars, state where on defendant's system these said cars were operated.

36. Give the names and addresses of all offices or departments of the defendant that did the same type of work done by the department in which the plaintiff was employed at the times involved herein.

37. What was the number of blueprints kept or stored in the department involved herein?

38. What was the number of blueprints made by the department involved herein annually at or about the times involved herein?

RICHTER, LORD & FARAGE
By
Counsel for Plaintiff

## PLAINTIFF'S SUPPLEMENTAL INTERROGATORIES.

Martha C. Reed, the plaintiff in the above action, by her attorneys, Richter, Lord & Farage, Esquires, hereby makes demand that the defendant or its counsel answer the following supplemental interrogatories under oath, pursuant to Rule No. 33. These supplemental interrogatories shall be deemed continuing, so as to require supplemental answers if defendant obtains further information between the time answers are served and the time of trial:

39. State what use was made of the blueprints on or with which the plaintiff worked, indicating where and by whom such use was made.

40. Unless already disclosed by answers to preceding interrogatories, specify whether these blueprints in the normal course of their use were sent across state lines for use by the defendant's employees. If so, indicate to what states other than Pennsylvania such blueprints were sent and the approximate percentage of blueprints that were sent to other states:

(a) During the year plaintiff was injured;

(b) During the year preceding plaintiff's injury.

RICHTER, LORD & FARAGE
By
Counsel for Plaintiff

*Defendant's Answers to Interrogatories and Supplemental Interrogatories*

## DEFENDANT'S ANSWERS TO INTERROGATORIES AND SUPPLEMENTAL INTERROGATORIES.

Defendant, The Pennsylvania Railroad Company, makes the following answers to interrogatories propounded by plaintiff:

1. Yes.

2. Yes. Statement made to E. C. Sloan at Philadelphia, Penna., on August 24, 1951. Statement is in the custody of counsel.

3. The accident first came to the attention of the defendant on July 19, 1951. Plaintiff reported to Medical Examiner, C. J. Wickert.

4. Medical reports will be furnished in accordance with agreement between counsel.

5. Yes. See medical reports furnished in accordance with agreement between counsel.

6. Yes.

7. A statement concerning the accident was given by George D. Sprankle to C. K. Steins at Philadelphia, Penna., on August 18, 1953. Statement is in the custody of counsel.

8, 9. No.

10. Following is a list of those persons defendant knows or believes to have been witnesses within sight or hearing of the accident other than those already disclosed

by preceding interrogatories: L. W. Bertram, 10 Hilltop Road, Plymouth Valley, Penna.; C. M. Gulliford, 201 West Avenue, Wayne, Penna.; E. D. McCloskey, 3937 Pine Street, Philadelphia, Penna.; E. J. Tedeschi, No. 7 Old Conestoga Road, Strafford, Penna.; W. A. Weir, 38 N. Lansdowne Avenue, Lansdowne, Penna.; J. F. Matteo, 412 Folsom Avenue, Folsom, Penna.; J. G. Bertulis, Jr., 7211 Penarth Avenue, Upper Darby, Penna.; A. R. Berger, No. 7 Conestoga Lane, Berwyn, Penna.; Max Seel, 113 W. Drexel Avenue, Lansdowne, Penna.; W. F. Bugg, 36 High Street, Woodbury, New Jersey; R. M. McCullough, 344 Westpark Lane, Cliffton Hts.; N. J. Sprass, 623 West Lindley Avenue, Philadelphia, Penna.; L. J. Schlachter, 1917 N. 61st Street, Philadelphia, Penna.; L. A. Hansen, 4231 Baltimore Avenue, Philadelphia, Penna.; H. F. Dillman, 437 Harwicke Road, Springfield, Penna.; L. J. Seider, 453 Osage Avenue, Philadelphia, Penna.; F. H. Cambria, 2050 Mercy Street, Philadelphia, Penna.; A. T. Volpack, 111 Ripka Street, Philadelphia, Penna.; J. A. Gower, 404 Baird Road, Merion, Penna.

11. C. K. Steins, Mechanical Engineer, 15 N. 32nd Street, Philadelphia, Penna., was plaintiff's supervisor at the time of the accident.

12. Plaintiff was not working at the time of the accident.

13. Rate of pay which plaintiff was earning at time of accident was $315.05 per month. Plaintiff received a $10.00 per month increase effective January 1, 1952, and additional $10.00 per month increase effective October 1, 1952, and an additional $6.00 per month increase effective October 1, 1953.

*Defendant's Answers to Interrogatories and Supplemental Interrogatories*

14. According to defendant's records, plaintiff has worked since the accident and is performing the same type of work.

15. From July 19, 1951, to the date of this answer, plaintiff has lost a total of 49 1/2 days from work.

16. Plaintiff's total earnings for 1951 amounted to $3,750.60 and of that amount, $2,055.34 was earned prior to the accident and the balance after the accident.

17. In the year 1949, plaintiff earned $3,418.76 (including $132.90 retroactive pay) and in the year 1950, $3,290.02.

18. (a) In the year of her accident and prior to said accident plaintiff lost 25 days as a result of sickness or disability.

(b) In 1950, plaintiff lost 5 1/2 days from her employment as a result of sickness or disability. In 1949, plaintiff lost 2 days from her employment as a result of sickness or disability.

19. Defendant did not subject the window to periodic inspections specifically to discover defects. Window is subject to inspection daily by any employee whose duties bring him into its vicinity.

20, 21. No written records were made or kept by defendant as to the condition of the window in question.

23. No.

24. The window involved in this accident, is located in Room 515, 15 N. 32nd Street, West side of building, 5th floor.

*Defendant's Answers to Interrogatories and Supplemental Interrogatories*

25, 26, 27. Through written statements for the accuracy of which it cannot vouch, defendant is informed that the window involved herein cracked a short time prior to the accident from top of light to bottom near center of glass.

28. The window involved in this accident was the upper sash of vertical two sash, steel frame window. Dimensions as follows: Steel sash frame—57 1/2 inches wide 43 inches high; glass—58 inches wide—40 inches high.

30. Twelve windows were broken at or about the same time as the window involved herein. Their number and location are as follows: Basement—2; 5th floor—4; 6th floor—2; 7th floor—1; 11th floor—1; 12th floor—1; 13th floor—1.

32. The general type of work being done in the department where plaintiff was employed at the time of this accident was the preparation of blueprints.

33. Plaintiff's duties at all times involved herein were, upon order, to pull Vandikes or tracings from file cabinets, take them to Print Maker, then return Vandikes or tracings to file cabinets after Print Maker finished with them.

34. The work done by other persons in the department wherein plaintiff was employed involved making and handling: (a) Blueprints of all mechanical equipment, cars, locomotives, cranes, etc.; and (b) Blueprints of all types of structures including bridges, trackage, etc.

35. The said cars depicted by the blueprints were operated over defendant's entire system.

*Defendant's Answers to Interrogatories and Supplemental Interrogatories*

36. None. Tracings have been and can be sent to independent firms for preparation of blueprints.

37. Approximately 325,000 original tracings are on file, many of which are duplicated in Vandikes and white prints. There are 20,000 to 25,000 Vandikes and several thousand white prints on file.

38. About 2,400 original tracings are made yearly by the Mechanical Engineer's draftsmen. In addition to this many reproductions of all types of equipment and trackage are made (Blueprints, Vandikes, White Prints and Ozalids).

39, 40. Plaintiff worked with Vandikes and tracings which are kept in the files of the Mechanical Engineer in Room 515, 15 N. 32nd Street, Philadelphia, Penna., and from which blueprints are made. The blueprints made by other employees of defendant are used by defendant's employees in Pennsylvania, Michigan, New York, New Jersey, Delaware, Maryland, Washington, D. C., Ohio, Indiana, Illinois and Missouri. Approximately 67% of the blueprints are sent to states other than Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY

By G. B. JANSEN

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, ss:

G. B. Jansen, being duly sworn according to law, deposes and says that he is Chief Claim Agent of The

Pennsylvania Railroad Company, defendant in this action; that he is authorized to make this affidavit on its behalf; and that the facts set forth in the foregoing Answers to Interrogatories and Supplemental Interrogatories are true and correct to the best of his knowledge, information and belief.

/s/ G. B. JANSEN.

Sworn to and subscribed before me this
19th day of January, 1954.
/s/ Daniel J. Simonson,
Notary Public

My Commission Expires: February 23, 1957.
(Seal)

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(1) DEFENDANT'S DEPOSITIONS.

Pre-trial oral examination of plaintiff, Martha C. Reed, taken at the offices of Barnes, Dechert, Price, Myers & Rhoades, 13th Floor, Packard Building, Philadelphia, Pa., on Thursday, September 10, 1953, commencing at 3:00 o'clock P. M.

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Appearances:

Richter, Lord & Farage, Esqs., by Donald J. Farage, Esq., representing plaintiff.

Barnes, Dechert, Price, Myers and Rhoades, Esqs., by Gordon W. Gerber, Esq., representing defendant.

(It is stipulated by and between counsel for the respective parties that the depositions may be (2) taken stenographically and thereafter reduced to typewriting and that signing, sealing, certification and filing be waived.)

(All objections, except as to the form of the questions, are reserved for the trial.)

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MARTHA C. REED, having been duly sworn, was examined and testified as follows:

BY MR. GERBER:

Q. What is your full name?

A. Martha Cornelia Reed.

Q. What is your address?

A. 20 South Valley Road, Paoli.

Q. You are employed by the Pennsylvania Railroad?

A. Pennsylvania Railroad, Mechanical Engineer's Office.

Q. What is your job classification?

A. I am classified now as a print maker, but on account of my height, I am serving as a file clerk because I am not tall enough to reach the machines. But my rating as far as my service is concerned, is as a print maker.

Q. That controls, primarily, your rate of pay; is that correct?

A. Yes.

Q. Actually, the work you do, you say because of your (3) height, is what you would call a file clerk?

A. Yes.

Q. Was that the position you held on July 19, 1951?

A. Yes, sir. I have worked that job for about—in the neighborhood of eight years or nine years; something like that.

Q. Just exactly what are your duties on that job?

A. Filing prints. The Mechanical Engineers Department makes all the prints of the entire system; that is, every nut, bolt, screw, and every part that a locomotive or freight car or anything in transportation is made of.

Q. So that what you do is ——.

A. I file the prints. The prints are made first on a transparent material; then they are made on the same as a negative in a photographer's shop, you know ——

Q. Excuse me for interrupting, but I don't think I can learn how the whole operation works. What do you, yourself, do?

A. I file those prints.

Q. And where do you get these prints?

A. From the machines. I get the orders out in the morning and the men make the prints and I re-file them in the afternoon.

Q. Well, have you a desk somewhere?

(4) A. No, I just run around the halls from file to file. I don't have a desk of any kind.

Q. Do you have any one particular place where you could say is your office?

A. No, because I just work all through the rooms.

Q. Where are these various rooms you describe?

A. We are all on the same floor.

Q. Which floor is that?

A. Fifth floor in the 32nd Street Building.

Q. And how many rooms are file cabinets in?

A. Well, the one place that I work particularly, in the negatives, is on the 5th floor, and then the next room is the blueprint department where the machines are that

the prints are made on, and they are partitions between the rooms. The drawing room and all are combined under the Mechanical Engineers Office.

Q. You work on the fifth floor of the ——

A. 32nd Street Building.

Q. Please let me ask the questions and I think I will be able to understand better.

You work on the fifth floor of the 32nd Street Building exclusively?

A. Yes.

Q. How many rooms are on that floor?

(5) MR. FARAGE: If you know.

A. Well, now, they are not particularly rooms. What I mean is each division is separated with file cabinets. There's no solid walls like in here now.

BY MR. GERBER:

Q. Is there one solid room divided into various component parts ——

A. That's right.

Q. —by file cabinets?

A. Yes.

Q. So that there is actually one large room.

A. Yes.

Q. That is the room in which you work; is that correct?

A. Yes.

Q. Approximately how many of these partitioned areas are there?

A. Well, in the neighborhood—where I am most of my time, there's about five sections.

Q. So that you work in approximately five of these partitioned areas which are enclosed within this one room?

A. Yes.

Q. There are other partitioned areas but you don't usually work in them; is that correct?

(6) A. No, but my job requires me to go out into the drawing room to the draftsmen after prints; that is the largest room.

Q. Let me understand what you are saying now. Are these draftsmen in this same large room but in another partitioned area?

A. Yes. We all belong to the same division.

Q. I am trying to find out where you work and what you do.

MR. FARAGE: I think she's telling you.

BY MR. GERBER:

Q. Well, perhaps I don't understand and you are telling me.

When you have said "room" in the last statement, you meant a partitioned area?

A. Yes.

Q. You work in five of these partitioned areas and you also go into a sixth partitioned area to pick up some of these plans that you just described?

A. Yes. Well, this is what I mean by a partitioned area. There are so many file cases, head high, and they are all files on this side and that side, and that is what I mean by the partitions.

Q. Well, we have agreed, have we not, that this is one (7) large room; that within this room there are various areas ——

A. Of file cases.

Q. —which are marked off by file cabinets as distinguished from walls; is that correct?

A. Yes.

Q. That is established.

A. Yes. Then I also work ——

Q. When we talk about a partitioned area or room, we mean only the partitioned area; is that correct?

A. Well, I can't say whether you will take it as I say. These here file cabinets as high as my head—that's the height of the cabinets—there is a row here and a row here and on the other side, and I have to go back and forth between all these different rows to do my job.

Q. Miss Reed, I am not trying to confuse you and I'm sure you aren't trying to confuse me. I am trying to find a language in words we can both use that will mean the same thing. Let me suggest these words. We agree this is one large room.

A. Yes.

Q. And we agree that in this room there are various areas which are marked off by file cabinets?

(8) A. Yes.

Q. And when you talk about going from room to room, you are talking about going from partitioned area to partitioned area, the partitions being file cabinets rather than walls; is that correct?

A. Yes, that's the way I work. Yes.

Q. Now, you work in approximately five of these partitioned areas?

A. Yes, in the neighborhood of five.

Q. And you said you go into perhaps a sixth one to pick up plans to carry into the file ——

A. In the main room, yes.

Q. Where is the main room?

A. Right across on the side where I work only it's where the draftsmen work.

Q. And that is also a room in the sense it is separated from the rest of the room by file cabinets?

A. No, it is one large room.

Q. The drafting room is a separate room enclosed by walls?

A. Yes.

Q. So that you go into that room by going through a door, not by walking between file cabinets; is that correct?

(9) A. That's right.

Q. Do you work in any other rooms?

A. Well, in the vault.

Q. Where is the vault?

A. That's just another partitioned off place. It's a fireproof place where tracings are kept. We have two vaults, No. 1 and No. 2 vaults, where we keep them for safety, you know, on account of fire.

Q. That is a separate room?

A. That is a separate room, yes.

Q. What does your work entail?

A. Filing it all, and if I don't have a negative ——

Q. You pick up papers at one desk or partitioned area ——

A. That's right, and make up the orders.

Q. What kind of orders?

A. The shop orders where they make the materials and the materials that were made and where cars are assembled and all kinds of work like that. The orders come in through the mail.

Q. Well, you pick up plans.

A. That's right.

Q. Then what do you do with them?

A. Well, these orders come in on tablets like this (indicating).

(10) Q. From where do they come?

A. From different shops on the Pennsylvania Railroad.

Q. Where do you get them?

A. They come into the main office.

Q. When you say "main office" you are referring to the drafting room?

A. Well, the blueprint clerks are at the one end of the drafting room, and this man makes—brings out those orders to me and I fill them.

Q. You get your papers from the blueprint man in the blueprint or drafting room?

A. That's right.

Q. What is his name?

A. Mr. Stone. Mr. Wertzburg is the foreman, but Mr. Stone has charge of the orders.

Q. Mr. Stone is the man that gives you the papers?

A. Yes.

Q. What do you do with them?

A. Well, you see, those papers are all over numbers. The prints are filed in numerical order and are all numbered and I have to check on those numbers on those papers and pull out the prints accordingly and the orders go back to the blueprint room.

Q. The piece of paper you get from Mr. Stone indicates (11) to you what papers you are to take out of the file cabinet and return to Mr. Stone?

A. I make up the orders and put them in the blueprint room behind the machines for the men to work on. That's the work they are going to do for the day.

Q. Stop me if I am not right. Your job is to get a piece of paper from Mr. Stone, which is instructions to you to get a certain paper or group of papers out of a filing cabinet and to return them to some other man in the blueprint department who would then work on them?

A. That's right, the men that operate the machines.

Q. Then when the men finish working on the papers, they return them to you and you return them to the file; is that correct?

A. That's right.

Q. At that point, do you return to Mr. Stone the paper he gave you?

A. No.

Q. That stays with the blueprint man?

A. That's right.

Q. And he does something with that?

A. And there are girls in there who check ——

MR. FARAGE: Why don't you let her tell her story in her own way instead of guessing what she (12) does.

MR. GERBER: I am trying to get Miss Reed to limit herself to what she does, because I realize this is a complicated job and many people do many different jobs.

BY MR. GERBER:

Q. So, if we limit ourselves to what you do ——

A. What I want you to understand in the first place, ~~these prints are the~~ prints or forms of which people follow the blueprints, the same as plans for your house or anything. These prints are pictures that the shop men follow to build the cars, freight cars and locomotives and such things as that. They come in different sizes and they are all in numerical order, and they are 6 by 8 up to—some of them are as long as 12, 15 and 20 feet long.

Q. I am trying to limit this to just what you do.

A. That's what I work on.

Q. You get a piece of paper ——

A. With a number on it.

Q. This number tells you where, in which file to go to get out certain papers.

A. That's right.

Q. You get them out and take them to someone else who (13) does more work on them?

A. That's the man who operates the machine.

Q. And he makes copies of what you gave him?

A. That's right.

Q. What are some examples of the papers you carry from the filing cabinets to the various men?

A. As I say, they run from 6 by 8 up to 12, 15, 20 feet long prints. It all depends. Now, a casting or something like that sometimes will be almost as long as that wall, and then there are rolled prints that go into a pigeon hole cabinet, and they are rolled prints. Otherwise, the others are all flat in the case and they have to be drawn out and put back according to the numbers.

Q. There are different shaped papers in different filing cabinets?

A. That's right; A, B, C, D, E & F are the sizes of prints.

Q. Are there any other persons doing the same job that you do?

A. Well, there is one girl who works on practically the same thing other than she handles the tracings on the smaller prints. I handle the large prints. She handles E and F prints, and I handle the others.

Q. What is her name?

(14) A. Louise Tucker.

Q. On July 19th, 1951, you were involved in an accident ——

A. That's right.

Q. —as a result of which you brought this suit; is that correct?

A. That's right.

Q. Would you describe in your own words what happened?

A. Well, it was lunch time and I had been eating out in the drawing room. I was eating my lunch and somebody said, "Look at the hailstones" and I walked across the room and looked out the window and then I turned around in this direction (indicating), and I had a sandwich in my hand ——

MR. FARAGE: Indicating the sandwich being held in which hand?

A. Right hand. And I was cut here and cut here (indicating).

BY MR. FARAGE:

Q. Indicating you were cut on which hand?
A. My right hand.
Q. Where?
A. Here (indicating).
Q. Between the thumb and the index finger?
(15) A. That's right.
Q. And where else?
A. Up here on my arm.
Q. Indicating on the upper muscle of the arm?
A. That's right. The cut was this way (indicating). I had seven stitches there and ten stitches on my hand.

BY MR. GERBER:

Q. What time did you go to lunch?
A. 12:25 to 1:05 is our lunch period, and it was in between that time, 12:25, around quarter of one, when the storm broke.
Q. Where were you eating your lunch?
A. At the other side of the room, and I walked across the room and looked out the window.
Q. Which room?
A. The drafting room. See, I don't have any stool or chair or anything where I work at all. There's nothing to sit down on where I work whatever and I always eat outside in the drafting room on one of the desks.

Q. Am I correct in saying you were not in the large room that is divided into partitions by filing cabinets?

A. No.

Q. But rather, you had gone into ——

A. I was still in our own department.

(16) Q. —the room which you described as being occupied by draftsmen and people who make blueprints?

A. That's right.

Q. Were other people in there eating lunch, too?

A. There was a few at the time, but I don't know who they were. I know there's very few people that stay in at lunch time. They nearly all go out, and they had gone out for lunch.

Q. At approximately 12:45 the hailstorm started?

A. Yes, something like that.

Q. Had you finished eating your lunch?

A. No, I had my sandwich in my hand.

Q. You were still eating lunch?

A. Yes, and I walked to the window.

Q. Who was it that said, "Look at the hailstones"?

A. One of the drafting boys.

Q. Do you know his name?

A. Roy Bertram.

Q. When he said that, the storm had just started?

A. That's right.

Q. How many other people were in the room?

A. I don't know.

Q. Would you say fifteen or two others?

A. More than two, but I wouldn't say—I couldn't say (17) there was fifteen.

Q. Would it be closer to six or ten?

A. Well, now, I can't tell you. I wouldn't commit myself because I haven't the least idea how many was there.

Q. But more than two and fewer than fifteen?

A. Yes, I am sure there was fewer than fifteen.

Q. When you walked over to the window, you saw the hailstones—

A. And I turned like this (indicating) ——

Q. What did you see when you looked out the window?

A. Hail about like that (indicating size of hailstones).

Q. Indicating hailstones approximately ——

A. Like a walnut.

Q. —the size of walnuts?

A. Yes.

Q. Would you say you had indicated a sphere with a diameter of approximately an inch and a half to two inches?

A. Oh, I wouldn't know. I didn't pay that much attention. I barely walked over and turned around and the other window blew in and crashed from these large hailstone.

Q. How large were the hailstone?

MR. FARAGE: She told you she doesn't know.

(18) MR. GERBER: She said as large as walnuts and held ur her fingers indicating that, and I am trying to get th size she indicated.

A. I said as large as walnuts.

BY MR. GERBER:

Q. You don't care to estimate how large—

A. I wouldn't have the least idea.

Q. Would you kindly let me ask the question?

Do you care to estimate the size of the sphere which you indicated?

MR. FARAGE: She's answered "No" to that.

A. No, I couldn't.

MR. FARAGE: Don't answer any more questions along this line. I will permit you to ask a question once or twice, but I won't permit you to harass the witness.

MR. GERBER: I am not harassing the witness, I asked here half of a question several times. I think the witness will have no difficulty answering my question if I ever get to ask it.

MR. FARAGE: If you will let her tell her story in her own way, you will get it much faster instead of trying to put words into her mouth.

MR. GERBER: I am not trying to put words (19) in her mouth.

A. I wouldn't have the least idea as to the size.

BY MR. GERBER:

Q. The question I want to ask you is this. You will see that it is very simple.

Do you care to estimate the size of the sphere which you indicated with your fingers a moment ago when you said you looked out the window and saw hailstones this size, indicating a circle with your two fingers?

A. No. I said the size of a walnut.

Q. You wouldn't care to estimate it any closer than that?

A. No.

Q. Did you notice any rain?

A. Well, it was storming so hard that I don't know.

Q. You don't know whether it was raining; is that correct?

A. I don't know whether it was raining or what. Of course, you couldn't see across the street other than this awful hailstones dropping on the window sill.

Q. What prevented you from seeing across the street?

A. Why it must have been rain. I don't know. I can't say whether it was raining or what it was doing, other (20) than this awful hail, and the storm. Everything was blowing right and left.

Q. Was the wind blowing?

A. It was terrific.

Q. How could you tell the wind was blowing?

A. You could hear it.

Q. You could hear it?

A. Certainly.

Q. Were there any trees around there?

A. There are no trees across the Armory there at 32nd Street, no.

Q. Was there anything else there that indicated that the wind was blowing?

A. Papers and things were flying around.

Q. Were the hailstones blowing around?

A. Sure.

Q. Was it cloudy and dark?

A. Very black.

Q. At this point, you turned and walked away.

A. I turned around and started back and the window on that side crashed in, the upper part of the window next to the one I had been looking out of. If I had been still standing there it wouldn't have affected me, but I turned and got in the sweep of it and I was 10 or 15 feet (21) away from the window when it crashed and hit me, and I didn't realize I was hurt, and I grabbed a paper towel ——

Q. Had you noticed anything unusual about the window at the time?

A. No, other than that window had been cracked a long time before.

Q. Had you known the window was cracked before?

A. Yes.

Q. When did you notice, prior to this, that the window was cracked?

A. It had been cracked a long time, but I couldn't tell you how long.

Q. When you say a long time, would you say that meant ten years, ten months, ten weeks, ten days?

A. It could have been a month or so that I had noticed it.

Q. As long as a month before this accident?

A. That's right.

Q. Had you said anything to anyone about it?

A. No, because it wasn't my department.

Q. But you hadn't told anyone that this window was cracked?

A. No. I didn't have anything to do with that.

Q. Where was it cracked?

(22) A. From the corner down like this (indicating), cater-corner across the window.

Q. At the top half of the window?

A. That's right.

Q. And the crack ran from the bottom of the top half or from the top of the top half?

A. The top half of the window.

Q. Where was the crack on the top half?

A. Toward the top and it came down on a triangle down to the middle of the window.

Q. Was it from top to bottom or from the top to one side?

A. I think it ran this way (indicating).

Q. Are you indicating from the top to the side?

A. Yes.

Q. You are indicating—if I am wrong, tell me—from the top of the window to what would be the right-hand side as you face the window?

A. That's right.

Q. Approximately how long was this crack?

A. It was clear across the window. Of course, those windows are not quite as wide as these.

Q. Would you estimate that crack to be a foot or two feet long?

(23) A. Longer than that.

Q. Two to four?

A. Well, it was from one side of the window to the other.

Q. A moment ago I thought you said it was from the top to the right-hand side?

A. It was from the upper left corner to the right-hand corner; down toward the right-hand corner. It was clear across the window.

Q. Did the top portion of the crack touch the top of the window or the left-hand side of the window?

A. I can't tell. I know the window was cracked and that's all.

Q. Did the bottom part of the crack touch the side of the window or the bottom of the window?

A. I can't tell you.

Q. You can't tell us anything about the crack?

A. No.

MR. FARAGE: She's told you it's across the entire window.

MR. GERBER: And she told us it was from the top to the side.

MR. FARAGE: Yes, all the way over.

MR. GERBER: And she told us it was from (24) side to side. Now she tells us she can't tell us anything, so we have three different ideas.

MR. FARAGE: I think the record can stand on what she said.

BY MR. GERBER:

Q. Do you know of anyone else who had noticed this window was cracked before the day of this accident?

A. The boy that worked under it knew it was cracked.

Q. What is his name?

A. Frank Willis.

Q. To whom was this accident reported?

A. Well, the assistant engineer was upstairs at the time when they were bandaging me up, Mr. Gower. I went up to the relief office to have my hand bandaged. I didn't know at the time that my arm was cut up here, but I grabbed a paper towel and went upstairs, and when I got up there I found my clothes were all soaked up there and I found I had been cut up there also. Mr. Fredericks took me to the Presbyterian Hospital to have it sewed up.

Q. What did they do at the hospital?

A. What do you mean? They just sewed me up.

Q. They sewed you up. Did they do anything else?

A. Nothing.

Q. And they discharged you from the hospital?

(25) A. They sent me home that night. They sent a man from the office to take me home.

Q. Could you tell us chronologically the various doctors you have seen since the time of this accident and what they treated you for?

A. Dr. Hamilton, the relief doctor in the building, and then he sent me down to South 17th Street for physical therapy, and that was to Dr. Hammer's office, but he was on vacation at the time and the other man—I can't tell you what his name is in the same building with him—but the nurse gave me the physical therapy and when I got through with that, why this other doctor examined

me, my hand, and told me to go home and keep it in action.

Q. Was this other man you just mentioned also in this office?

A. At Dr. Hammer's office, but I can't tell you what his name is because I was directed to Dr. Hammer.

Q. After the treatment you received at Dr. Hammer's office by this other man, who treated you next?

A. He told me I should go home and keep it in action, put it under hot water and use a rubber ball and that would loosen it up, and I kept that up and went back to work during the day and suffered at night with the pain. (26) It was unbearable at night, and I was thinking I was going ahead doing the best thing for it and it became so unbearable I took it up with Mr. Anderson.

Q. Did you go to another doctor?

A. No, I haven't been to anybody other than the railroad has sent me to.

Q. You have seen no doctor other than the ones you mentioned so far?

A. No. Then I got in contact with Anderson and asked him what they were going to do about it.

Q. Did you go to another doctor after that?

A. Only to whom they sent me.

Q. Can you give us the names?

A. Well, at Jefferson Hospital, to Dr. Jagger.

Q. What did he do?

A. He said it wasn't nerves. He made an examination and he said it was a tendon.

Q. What did he do other than the examination?

A. That's all he did. He sent a report back that it wasn't nerves, that I should go to a tendon specialist, and he sent me to Dr. Orr, which is a tendon specialist, and he said it wasn't a tendon; he said it's the nerve and he says that nerve was caused by the scar tissue there.

Q. Just a moment, Miss Reed. I think we can make it (27) much shorter if you will answer the question.

What did Dr. Orr do?

A. He made the examination.

Q. Did he do anything other than examine?

A. No, because he said it wasn't the tendon, and he is a tendon surgeon.

Q. Did you go to another doctor?

A. He advised me to go to Dr. Groff.

Q. What did Dr. Groff do?

A. Well——

Q. Excuse me. I don't mean to be rude, but these doctors can give us the medical language; you can tell us what they did.

A. They just made the examinations and made their decisions.

Q. There was no further treatment?

A. No.

Q. They each examined you?

A. That's all.

Q. None of these other doctors treated you.

MR. FARAGE: Until you got to Groff.

A. When I was sent to Dr. Groff Dr. Orr sat in on consultation, and that's when they sent me, on the 22nd of June, to the hospital for this operation.

(28) Q. On June 22nd of this year?

A. Of this year.

Q. On June 22nd of this year, you went to the hospital——

A. Graduate Hospital.

Q. —and who performed the operation?

A. Dr. Robert Groff.

Q. How long were you in the hospital then?

A. Well, I went in Monday afternoon and came home Thursday, and I was off from work five weeks.

Q. After that?

A. Yes.

Q. All of these examinations have been of your right arm in two places which you indicated; is that correct?

A. That's right. When they decided to perform the operation I just had the use of those two fingers (indicating). My entire hand was paralyzed and the pain up here (indicating) was so bad at night I just had to take medicine all the time to get any sleep at all. The pain was unbearable, and as soon as Dr. Groff got hold of me he said there was scar tissue caused from where they sewed me up in the first place.

Q. But when you say "these two fingers" the record won't show which ones you indicated.

A. The two last fingers. The rest of my hand was (29) paralyzed.

Q. At the time you had the operation you had only motion in the first two fingers, the little finger and the one next to it?

A. That's right.

Q. The rest of them were paralyzed.

A. They jabbed me all over with pins and needles to find how far the nerve was in action.

Q. I notice at this point that you have regained the use of all of your fingers.

A. Yes, I have. There is feeling in my fingers now.

Q. And you have freedom of motion?

A. Yes, other than that (indicating with fingers).

MR. FARAGE: Indicating the thumb.

A. That indicates something that will never be any better, but the pain is gone.

BY MR. GERBER:

Q. Am I correct in stating at the present time the remaining results of this accident are the lack of complete motion in the thumb of your right hand that you just indicated, and, of course, the scar on your right arm?

A. That's right.

Q. Had you ever had any accidents or injuries to your (30) right arm before?

A. No, sir.

Q. Had you ever had any difficulty or trouble at all with your arm?

A. No.

Q. Had you ever been involved in any accidents?

A. No.

MR. FARAGE: Do you mean affecting the arm?

MR. GERBER: Any accidents at all.

A. No. Well, wait a minute. I was in the Bryn Mawr train wreck. I was in that train wreck and I had my back sprained, but that had nothing to do with my arm.

BY MR. GERBER:

Q. I was asking you about any accidents at all you might have had.

A. I had barely gotten back to work. That was in June after I hurt my back in that train wreck when I met with this accident.

Q. So you were involved in an accident in June of '51?

A. That's right.

Q. Had you ever been involved in any other accidents?

A. No, I have had no other accidents.

Q. Had you ever been hospitalized before?

(31) A. No, sir.

Q. How long have you worked for the railroad?

A. Since 1924.

Q. Have you ever been off from work for any injuries or diseases or illnesses?

A. Oh, a slight cold or something.

Q. In all that time, would i be correct in saying never for any period greater than a week?

A. Yes.

Q. That would be correct?

A. Yes.

Q. Have any X-rays been taken as a result of this accident, do you know?

A. Well, Mr. Sloan sent me down to a doctor for this hand, and when I went down to see Mr. Anderson, Mr. Anderson said, "Why would he send you for X-rays like that for a cut?"

Q. So no X-rays were taken?

A. Yes. He made me have 24 X-rays taken and they couldn't find anything.

Q. How much time did you lose from work altogether as a result of this accident?

A. Well, I was off five weeks after this operation, and I guess I would be safe in saying—I couldn't (32) say positively without checking the records, when I was first hurt. I imagine I was off about five weeks that time, too.

Q. When you say "first hurt" are you talking about the accident in June or when you first got cut?

A. When I first had my injury in this arm. That was in 1951.

Q. July of 1951?

A. That's right.

Q. You would approximate that you lost five weeks in the beginning when you first were hurt, and five weeks when you had the operation?

A. Yes.

Q. Had you been paid by the railroad during all of this time?

A. Yes.

Q. When did you return to work permanently?

A. July 27th.

Q. So you returned to work on July 27th, 1953, and have been working steadily since?

A. Well, that's after this operation?

Q. Yes.

A. Yes.

Q. Would you say your work is satisfactory now that (33) you are back at work?

A. I haven't heard no complaints about it.

Q. In your opinion are you doing your work satisfactorily?

A. I am doing the same thing, s.

Q. You are doing the same work in the same way you had done it before?

A. Yes. Of course, when I first got back I was terribly sick and my nerves had been so shattered by evening I was practically worn out, but I was doing my eight hours' work.

Q. And you were doing your work satisfactorily?

A. That's right.

Q. How many days would you say you felt this tired feeling after work?

A. About two weeks after I got back.

BY MR. FARAGE:

Q. From the operation, you mean?

A. That's right, when I returned permanently to work.

BY MR. GERBER:

Q. By the way, wasn't this the same storm where the Presbyterian Hospital had part of it blown in?

A. That's right. The flue was blown down in one of the —I think one of the heart wards. It was terrible.

Q. So on this very same day when you went up to the (34) hospital; part of the hospital had been blown down?

A. That's right. They were in awful shape when I got up there—Mr. Fredericks took me up there—and they couldn't get the blood stopped. I was bleeding badly and they got a doctor as fast as they could, but the corridors were lined on both sides with patients.

Q. And you saw these patients?

A. Yes.

Q. Did you see part of the building that was pushed over at all?

A. No, they got me into a room, and a short time after they got me into the room they brought in a woman who had been bumped with a street car or automobile and she was making so much fuss, I couldn't tell you what, but of course, that was no good for the condition I wa in.

Q. The entire hospital was in a state of confusion?

A. You never saw such a place, and the only thing they did to me, they jabbed me with novocaine. They didn't give me nothing to relieve the shock; they just give me a novocaine local. That's the way they sewed me up and then they sent me home.

Q. Am I correct in saying that the only doctors you have gone to were the doctors the railroad sent you to?

A. That's right.

(35) Q. And the railroad has taken care of all those bills?

A. That's right, other than the train wreck. They didn't take care of that one yet. They said they would pay it, but when I decided to pay off.

Q. As a result of this accident, then, you haven't had any medical expenses of your own?

A. No, they have taken care of that.

Q. I suppose that you lead a normal life at the present time; as normal as you had led before?

A. No, indeed.

Q. No?

A. No, indeed. When I get out of eight hours of work I go home and rest. I am not fit to go to any social affairs or anything else because I've got to be prepared for the next day.

Q. That's as a result of being tired?

A. Nervous strain; yes.

MR. GERBER: That's all.

BY MR. FARAGE:

Q. Did you have that nervous strain before this accident?

A. No, I never lost a day's work for sickness or any thing.

(36) Q. Now, you said you were having your lunch in this drawing room. Where do you ordinarily have your lunch?

A. I always sit at this man's desk.

Q. Did your boss know you had your lunch there every day?

A. I would say so, because the chief clerk always eats on the other side of the room and I have been eating there for years.

Q. Has anyone ever told you you can't eat there?

A. No.

Q. Is there anywhere else you can eat?

A. If I go over to another girl's department.

Q. Another department?

A. Yes.

Q. Now, you mentioned these prints. What are these prints used for, do you know?

A. To build the cars, the same as a blueprint for a house.

MR. GERBER: Mr. Farage asked you if you know.

A. That's what I am trying to tell him.

BY MR. FARAGE:

Q. You do know?

A. Certainly.

(37) Q. Tell us what they are used for.

A. For building the cars, freight cars, locomotives, Diesels and all. We have all the blueprints for every piece of equipment that is put onto a locomotive.

Q. And where are these things sent?

A. To the shops.

Q. And where are the shops?

A. We have shops in Wilmington, shops in Pittsburgh, shops in Altoona. The main shops are in Altoona, Columbus, Fort Wayne.

Q. Indiana, you mean?

A. Yes, sir. They go over the entire—as far as the Pennsylvania Railroad is concerned; Washington—anyplace that the Pennsylvania runs, we send them prints.

Q. Now, you mentioned going to look out of a window just before this accident. Was that the window that broke, the one you were looking through?

A. No, it was the one next to it.

Q. Next to it. Putting yourself in the position where you were looking out of the window, was it the window to the left or to the right of the one you were looking through that eventually crashed?

A. The one to the left.

Q. As you were looking out; is that right?

(38) A. That's right.

Q. How much space is there between the windows at that point approximately, if you can estimate that?

A. Well, I would say ——

Q. How much wall space between the windows?

A. —four to five feet.

Q. Now, after you turned around to leave, in which direction did you go; towards the windows that finally broke or away from that window?

A. No, I was on my way back. I was going out this direction (indicating).

Q. In the opposite direction from the wall where the windows were?

A. That's right, I was going back to the table where I had been eating lunch.

Q. How far would you estimate you walked from the window you were looking through?

A. Ten to fifteen feet.

Q. And that window was four or five feet away from the other window?

A. That's right.

Q. And that would be a total of how many feet all together?

A. Well, what I mean, see, the windows were just like these two here (indicating), but there was a bigger space (39) between them.

Q. And you walked ——

A. I just turned around like this (indicating) and I was going back this way (indicating).

Q. How many steps had you taken?

A. 12 to 15 feet.

Q. From the window that you had been looking through?

A. From the one where the window came in on me. See, I had turned and I was in this position (indicating) when it blew in past me.

Q. In other words, your back was not to the window?

A. No, I wasn't quite turned around.

Q. You were in the process of turning.

A. I was more on an angle, see.

Q. You mentioned the glass hitting you between the thumb and your index finger and also on the upper part of the arm. Was there any other part of your body affected?

A. I was struck here (indicating).

Q. Indicating directly under the right breast.

A. And the upper abdominal region. I had a black and blue mark about that wide (indicating).

Q. Indicating about three inches?

A. In the neighborhood ——

(40) MR. GERBER: It looks like an inch and a half.

BY MR. FARAGE:

Q. Show us again with your hand.

A. (Witness indicates on her body.)

Q. Which finger are you using?

A. The middle finger.

MR. GERBER: It looks to me the size of the hail stones.

MR. FARAGE: Would you stop being funny. Would you agree that is about three inches?

MR. GERBER: Approximately two and a half to three inches.

BY MR. FARAGE:

Q. How long did you have that bruise?

A. Well, several weeks.

Q. When did you first discover it?

A. That night after I got home from the Presbyterian Hospital.

Q. When did you first call it to the attention of any physician?

A. Well, the next time I went in I showed it to him and he laughed at me, and I said, "I better have an X-ray because it might affect the ribs" and he said, "Oh, that's (41) only the soft part of the abdominal region" and he said, "You'll live through that."

Q. Following this accident, were you able to do your work at home?

A. No, I had to have my girl friend and sister to help me. I had everybody in the country helping me.

Q. What expense was entailed in having this help?

A. Well, I had to feed them and I had to have my laundry sent out.

Q. How long?

A. Well, the duration of the five weeks both times.

Q. Both five-week periods, you mean?

A. That's right.

Q. Can you estimate the total expense of the laundry you had to pay?

A. Well, it varied. Some weeks, $2, and some weeks it wasn't quite that much. In the neighborhood of $2 a week.

Q. And how much do you estimate the extra food cost you to feed these people who were helping you?

A. Well, what food you have to buy for the second person when you are living alone. You know it takes a lot more for two than for one.

Q. Can you estimate the total for those ten weeks?

(42) A. In the neighborhood of $40 to $50.

Q. Did you have to pay them anything of any kind?

A. Well, I bought them things for staying with me.

Q. How much did you spend in the way of gifts?

A. Well, my sister, I bought her a dress, and the other girl friend, I bought her bedroom slippers. She was out of them and I thought it would be nice to get them for her.

Q. Can you estimate the expense that you had for the gifts?

A. Well, about $15.

Q. Now, how did you get to and from the doctors and hospitals after this accident?

A. Well, I came in on the train to the Suburban Station and took a taxi down to the doctors, and the same way up to the Presbyterian Hospital until I was able that I could go on the trolley, and then I took the trolley.

Q. Can you estimate the cost of your trolley and taxi bills, approximately, for the ten-week period or whenever it was that you went to the doctors and hospitals?

A. Well, I would say $5 each time would cover it.

Q. Can you give me a total figure: the approximate amount you spent to go——

A. Both times?

(43) Q. All the time you took cabs and went on the trolley.

A. Ten to twelve dollars.

Q. Now, you were talking about the pain you had following the accident. How long did that pain continue?

A. Well, it was going on for about, I would say in the neighborhood of a year, and getting worse all the time.

Q. When did you first get relief from the pain?

A. After Dr. Groff operated on this arm. After he loosened the nerve.

Q. Which doctor made that scar there (indicating)?

A. This one?

Q. Yes.

A. Dr. Robert Groff.

Q. Did you ever have that scar there before?

A. Oh, no.

Q. And that scar is about five and a half, six inches long?

MR. GERBER: I think that is approximately that, yes.

BY MR. FARAGE:

Q. And it is approximately 3/8 or a quarter of an inch ——

A. I had twelve stitches in there.

Q. I believe you said you had stitches between the (44) thumb and the forefinger.

A. Yes, I had ten stitches here.

Q. Are these marks I am pointing to part of the stitches?

A. Yes.

Q. How, if at all, have they affected the movement of your thumb?

A. Well, of course, my thumb is stiff there.

Q. On which joint is it stiff?

A. It's stiff on both. See, I can put this one down, but I can't ——

Q. You can't bend your thumb down to your hand?

A. No. It's stiff that way, but it's free of pain now. Before, the pain was unbearable in there and the palm of my hand was sore all the time until Dr. Groff performed this operation, and I was sore up in this section of my arm.

Q. Indicating over the right elbow, in the back.

A. I forget the nerve he called it is there, and I couldn't put my elbow on the table like that at all.

Q. Now, you mentioned that you had pins or needles stuck into your hand. Over what parts of your hand did they do that?

A. Clear back to here (indicating).

Q. Starting from where?

(45) A. The fingers.

Q. The tips of the fingers?

A. That's right, and up through here.

Q. Indicating over the palm of the hand.

A. To find where I had sensation.

Q. And where did you have sensation?

A. Only to here, and it wasn't a hundred per cent.

Q. Only in the last two fingers?

A. That's right.

Q. And the rest had no sensation?

A. That's right.

Q. Was it all the way back?

A. That's right. And the pain in here (indicating) was unbearable.

Q. Indicating over the thumb area?

A. That's right.

MR. FARAGE: I have no further questions.

BY MR. GERBER:

Q. Were there any shades or venetian blinds on any of these windows?

Q. Venetian blinds, but they are always up.

Q. Were they up on the day in question?

A. Yes.

Q. Do you know if there was any other damage done in (46) the building at all?

A. There was two other windows broken.

Q. Which windows?

A. In the blueprint department where the machines are and I think on the 6th floor the building supervisor told me of it, but you can't contact him because he died with a heart attack, Mr. Good.

Q. The pains you were describing were the ones that continued up until Dr. Groff made the operation?

A. That's right.

Q. When was that operation?

A. The 22nd of June of this year.

Q. Of 1953?

A. That's right.

Q. There are places to eat outside of the building; there are none in the building where you work; is that correct?

A. You mean lunch counters?

Q. That is correct.

A. If you go out ——

Q. This is 32nd Street.

A. Linton's is the closest, but you can never get in there, so I carry my lunch from home.

Q. These blueprints and papers that you work with, you (47) don't send them out, do you?

A. No.

Q. You give them to the men who work with them and they do what is necessary?

A. I put them behind the machines where they operate the machines.

Q. From then on, they do the work?

A. They go through the work and they have kids in there cutting them out with scissors and sorting them; that is checking them out for the different shops, and there's another girl who performs the mailing operation.

Q. Once you put them in the blueprint room ——

A. I don't have anything more to do with the machines and the prints are made and ready to come back to me for refiling.

Q. By the way, did the window you were looking through break?

A. No.

Q. Did any other window in that vicinity break?

A. No.

Q. You don't know what the condition of the other widow was that broke?

A. No.

Q. Were these windows all shut? (47a)

A. Oh, yes.

MR. GERBER: I have nothing further.

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(Hearing concluded at 3:50 o'clock P. M.)

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## DEFENDANT'S MOTION TO DISMISS.

DEFENDANT, THE PENNSYLVANIA RAILROAD COMPANY, moves the Court to dismiss this action and in support of its motion assigns the following reasons:

1. Plaintiff's complaint alleges that she suffered personal injuries during her employment, as a "print maker," by defendant.

2. There is no diversity of citizenship between the parties and federal jurisdiction is claimed by plaintiff solely on the basis of the Federal Employers' Liability Act and Safety Appliance Act.

3. Plaintiff's deposition and defendant's answers to plaintiff's interrogatories show that plaintiff's duties were not in furtherance of interstate or foreign commerce nor did they in any way directly or closely and substantially affect such commerce. On the contrary, plaintiff's sole

duties were those of a file clerk in the office of the Mechanical Engineer in defendant's 32nd Street Building in Philadelphia, Pennsylvania, where she allegedly suffered injury during her lunch hour.

4. On the basis of the undisputed facts it appears that plaintiff's claim is not encompassed within the terms of the Federal Employers' Liability Act or the Safety Appliance Acts and this Court has no jurisdiction over the subject matter of the action.

WHEREFORE, the Pennsylvania Railroad moves the Court to dismiss this action.

/s/ PHILIP PRICE,
Attorney for Defendant.

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## NOTICE OF MOTION TO DISMISS.

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Richter, Lord and Farage
121 South Broad Street Building
Broad and Sansom Streets
Philadelphia 7, Pennsylvania

Please take notice that the undersigned will bring the above motion on for hearing before this court, United States Courthouse, Philadelphia, Pennsylvania, at the next argument list.

/s/ PHILIP PRICE
Attorney for Defendant,
The Pennsylvania Railroad Company

## ORDER.

This cause came on this day to be heard as to the motion to dismiss duly served and filed herein.

Whereupon after hearing arguments of counsel for the respective parties, and on due consideration thereof.

It is ordered that plaintiff's action be and it is hereby dismissed at plaintiff's costs.

, 1955.

J.

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## [OPINION] SUR MOTION TO DISMISS.

Before Kirkpatrick, Ch. J.:

The plaintiff is suing, under the Federal Employers' Liability Act, for injuries received when a window in the drafting room of the defendant's office building where she was employed was blown in during a windstorm.

Her duties are as follows: She is handed an order to remove certain papers* from a filing cabinet. She gets them and gives them to a man in the blueprint department. When he has used them to make blueprints from, he returns them to her and she replaces them in the filing cabinet. These are her only duties. To this may be added the fact that the blueprints were of "every

*In her deposition, she referred to these papers as "prints" but it is clear from the context that they were not blueprints, but drawings on transparent material from which blueprints were made.

part that a locomotive, freight car, or anything in transportation is made of—and that the blueprints were used to build car." They were sent over the entire system. Orders would come through the mail for them from various parts of the system.

It will be noted that the plaintiff had no contact with the blueprints, was not required to pick them up, carry them or touch them. The only contact she had with the materials or equipment of the Engineering Department was taking out and returning to the files the tracings from which the blueprints were made.

While the plaintiff's duties brought her a trifle nearer to furthering or substantially affecting interstate commerce than did those of the plaintiff in *Holl v. Southern Pac. Co.*, 71 F. Supp. 21, she was much further away than the plaintiff in *Straub v. Reading Company*, C. A. 3, March 10, 1955, which latter case the Court of Appeals stated was "definitely a borderline case." In the *Straub* case the Court of Appeals cited and discussed the *Holl* case, and appeared to approve of the result and the reasoning of that decision.

I am of the opinion that the duties of this plaintiff are not in furtherance of interstate commerce and do not directly or closely and substantially affect such commerce.

The motion to dismiss will be granted.

JUDGMENT.

BEFORE KIRKPATRICK, J.:

AND NOW, TO WIT: March 17th, 1955, in accordance with the Opinion of the Court granting defendant's motion to dismiss, it is ORDERED that the above action be and the same is hereby Dismissed, with costs.

BY THE COURT:

ATTEST:

s/ ROLAND J. GREENWOOD
DEPUTY CLERK

FILED
Mar. 17 1955
LEO A. LILLY, Clerk
By G. Dpty Clerk

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PLAINTIFF'S NOTICE OF APPEAL.

AND NOW, to wit, this day of March, 1955, the plaintiff above named, MARTHA C. REED, by her attorneys, Richter, Lord and Farage, Esquires, hereby gives Notice of Appeal to the Court of Appeals for the Third Circuit from the Order of the United States District Court for the Eastern District of Pennsylvania, entered on March 17, 1955, entering judgment dismissing action with costs.

RICHTER, LORD & FARAGE.

By
Counsel for Plaintiff.

## DESIGNATION OF RECORD ON APPEAL.

Appellant designates the following portions of the record to be contained in the Record on Appeal in the above-entitled case:

1. Relevant docket entries.

2. Complaint.

3. Answer of Defendant to Complaint.

4. Interrogatories Propounded by Plaintiff for Answer under Rule No. 33.

5. Supplemental Interrogatories Propounded by Plaintiff for Answer under Rule No. 33.

6. Defendant's Answers to Interrogatories and Supplemental Interrogatories.

7. Depositions of the Plaintiff taken by the Defendant on Thursday, September 10, 1953, at 3:00 P. M.

8. Defendant's Motion to Dismiss.

9. Opinion and Order of the Court dated March 17, 1955.

10. Notice of Appeal to the United States Court of Appeals for the Third Circuit.

11. This Designation.

RICHTER, LORD & FARAGE.

By

Counsel for Appellant-Plaintiff.

[fol. 61] Stipulation for Extension of Time for Filing Brief (Omitted in Printing)

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[fol. 62] Order Granting Leave to File, Reply Brief Out of Time (Omitted in Printing)

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[fol. 63] Motion for Leave to File Reply Brief Out of Time (Omitted in Printing)

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[fol. 64] United States Court of Appeals for the Third Circuit

No. 11,600

Martha C. Reed, Appellant,

v.

Pennsylvania Railroad Company

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued October 7, 1955

Before Biggs, Chief Judge, and Maris and Goodrich, Circuit Judges

Opinion of the Court—Filed November 17, 1955

By Goodrich, Circuit Judge:

This case involves the application of the Federal Employers' Liability Act [1] and its 1939 amendment.[2]

The plaintiff was injured when a window in the Thirty-Second Street office building of the Pennsylvania Railroad

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[1] 35 Stat. 65 (1908), as amended, 45 U. S. C. § 51-60 (1952).

[2] 53 Stat. 1404 (1939), 45 U. S. C. § 51, 54, 56, 60 (1952).

blew in upon her during a storm. She was at the time engaged in her work for the Pennsylvania. Her job was to serve as custodian of the files of master sheets from which blueprints were made. The subject matter of the blueprints was any part of locomotives, freight cars or other things used in the business of railroading. When an order [fol. 65] came from some point on the railroad's system asking for a blueprint of one of the tracings in the file, it was plaintiff's task to find the tracing there and take it to the blueprint maker, returning the tracing to the files when the blueprint maker was through with it. There is no substantial dispute on the facts. The sole question involved in the case is whether this plaintiff, when injured during the performance of her duties for the railroad, is within the scope of the Federal Employers' Liability Act and its amendment.[3]

The language which must be looked at is that of the 1939 amendment to the statute. The history of the original statute of 1906 and its 1908 successor does not need to be discussed at length here. The 1906 act was considered by the Supreme Court to have gone too far and was declared unconstitutional.[4] The 1908 statute was designed to meet the constitutional difficulties which the Court had considered in the 1906 act.[5] Many cases were decided under the 1908 act. They can be summarized sufficiently accurately for the discussion here by saying that what was required was "on the spot" participation in transportation.[6]

The 1939 amendment was designed to enlarge the cov-

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[3] Answering this question in the negative, the court below granted defendant's motion to dismiss. Reed v. Pennsylvania R. R. Co., Civil No. 15591, E. D. Pa., March 17, 1955.

[4] The Employers' Liability Cases, 207 U. S. 463 (1908).

[5] Second Employers' Liability Cases, 223 U. S. 1, 51 (1912).

[6] See, *e. g.*, Shanks v. Delaware, Lack. & West. R. R., 239 U. S. 556, 558 (1916), where the test was held to be whether "the employe at the time of the injury [was] engaged in interstate transportation or in work so closely related to it as to be practically a part of it . . ."

erage of the act.[7] How much did it enlarge it? Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, said in advocating its adoption:

> "Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in inter- [fol. 66] state commerce. *Its application will be confined, of course, to the character of employees now covered by the present act* . . . ." (Italics ours.)[8]

The pertinent language of the amendment [53 Stat. 1404 (1939), 45 U. S. C. § 51 (1952)] says:

> "Any employee of a carrier, *any part of whose duties* as such employee *shall be the furtherance of interstate or foreign commerce;* or shall, *in any way directly or closely and substantially, affect such commerce* as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Italics ours.)

It is to be noted that the two clauses are in the disjunctive. Each contains language from which one can get out as much as he cares to put in it. Take the word "furtherance," for instance, in the first clause. If one looks up furtherance in the dictionary he finds it is defined as "the act of helping forward," "promotion," "advancement," "progress."[9] It is quite clear, is it not, that a literal dictionary application of the word will sweep all employees of interstate railroads into the group covered by the statute. Take the copy writer who is penning an advertisement

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[7] Robinson v. Pennsylvania R. R. Co., 214 F. 2d 798, 799 (3rd Cir. 1954).

[8] *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess., on S. 1708, at 8 (1939).

[9] Webster, New International Dictionary (2d ed. unabr. 1941).

of the beauties of travel on the Broadway Limited on its trip from New York to Chicago and who suffers injuries when his desk chair collapses. Certainly the very object of his word painting is the promotion of more passenger business for the Pennsylvania on its crack interstate train. The same thing is true, is it not, of the printer who sets up the type or tends the press on the timetables for the Pennsylvania's interstate trains. His product is to help business by telling passengers when to get on trains and when to get off. Yet all this is a far cry from transportation [fol. 67] itself; [10] as much so as the typist in the president's office who writes a letter on a railroad matter, or the clerk who makes out the checks for the treasurer to sign.

If "furtherance" means in this statute everything that its dictionary listings include, the second clause of the section is meaningless repetition. The whole field has been covered already. In view of the constitutional difficulties

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[10] Relying on McFadden v. Pennsylvania R. R. Co., 130 N. J. L. 601, 34 A. 2d 221 (1943), appellant argues that under the amendment the employee's relationship to interstate commerce, rather than interstate transportation, is controlling. Yet she fails to point to any effect which her duties might have had on an aspect of interstate commerce other than interstate transportation. Indeed the interstate commerce involved in railroading is transportation. The Senate committee report indicates that the attention of the legislators was on transportation and transportation employees.

"This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

"

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." S. Rep. No. 661, 76th Cong., 1st Sess. 2, 3 (1939).

which the legislators found in the "affect" phrase, and the limitations they placed upon it, to be discussed in a moment; it is incredible to conclude that they were intending a scope for the first clause which is as broad as all out of doors. It is much more likely that the second clause is the broader and that "furtherance" was meant to cover those in the actual business of transportation itself [11] and the second clause was to cover the fringes.

We come then to the second clause in the amendment which brings in an employee whose duties either "directly" or "closely and substantially" affect interstate commerce.

This language had a very interesting legislative history. The first proposal made in the Senate bill was to have the [fol. 68] coverage of every employee whose work "in any way affected" interstate commerce. This was later modified to meet what was at the time thought to be a constitutional difficulty and the "directly" or "closely and substantially" modification appeared in the final bill.[12] That a broader reading of the then recently decided Labor Relations Act case would have indicated to the draftsmen that

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[11] It would appear that the "furtherance" clause was included to codify certain holdings under the 1908 statute. See, *e. g.*, Hines v. Wicks, 220 S. W. 581 (Tex. Civ. App. 1920), where it was held that an employee hauling out of state baggage from a train to a baggage room was furthering interstate transportation and within the limited coverage of the 1908 act. See also, Antonio v. Pennsylvania R. R. Co., 155 Pa. Super. 277, 38 A. 2d 705 (1944).

[12] During the hearings, Senator Austin said, in support of his motion to make the substitution:

> ["Directly" or "closely and substantially"] "occur and recur in many cases of recent date as defining what kind of effect on interstate is comprehended by the commerce clause of the Constitution . . .
>
> "
>
> "[They embody] the law as it is interpreted by the Supreme Court of the United States in National Labor Relations Board against Jones & Laughlin Steel Corporation [301 U. S. 1, 37 (1937)]; in the Bituminous Coal Conservation Act of 1935, in connection with N. R. A. Codes, and in

a constitutional difficulty did not exist,[13] is immaterial. They did not so interpret it." Instead they left to courts the problem of what is "directly" or "closely and substantially."

We need not worry much about the "directly" part of the clause. What is direct is not entirely sun-clear but is much easier to categorize than the second phrase, "closely and substantially."

In trying to decide what these words mean one is immediately reminded of the trackless maze of "proximate" cause questions in the law of Torts. The words are not capable of precise definition and it is likely they were not meant to be. Here was left an area for courts to deal with [fol. 69] sets of facts as they arose and to give an interpretation which would not push the act so far as to encounter constitutional difficulties.

The plaintiff urges that an employee's occupation closely and substantially affects interstate commerce if that employee's activities are such that without it interstate commerce would stop or be interrupted. From that it is argued that if Miss Reed failed to bring an ordered tracing from the file to the blueprint maker, the print for the locomotive wheel would not get to the machine shop; if it did not get to the machine shop, the repairs would not

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Carter versus Carter Coal Co. [298 U. S. 238 (1936)], and others . . ." *Hearings, supra*, note 8, at 58, 64.

Another noteworthy change in the original bill occurred during the Senate hearings. The first proposal would have included within the coverage of the statute "Any employee . . . whose duties . . . shall be in any degree incidental [to interstate commerce] . . ." *Hearings, supra*, note 8, at 2. This clause, which might well have extended the applicability of the statute beyond the "directly or closely and substantially affect" phrase, was eliminated from the final bill, apparently because of the constitutional difficulties thought to be involved. See *Hearings, supra*, note 8, at 64.

[13] In National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937), the Court held constitutional a statute which on its face covers activities merely "affecting" interstate commerce.

[14] See note 12, *supra*.

be made; if the repairs were not made, the locomotive or car could not run. If the locomotive or car could not run, interstate commerce would be, to that extent, interrupted. And if enough such omissions occurred, transportation on the great Pennsylvania system would grind to a dismal halt. Now of course that is true. But it is equally true that if the messenger boy who was supposed to pick up the letters containing the blueprints, addressed to the various shops throughout the railroad system, failed to pick them up and mail them, the same thing would happen. One is reminded of the old rhyme "for want of a nail the shoe was lost" and its dire chain of catastrophe.

We think it just as well if we do not try to lay down a litmus test which will give a red or blue reaction to all possible sets of fact. We think here that we are being asked to apply the act in a situation which would take us further than any case we have seen. We said in *Straub v. Reading Company*, 220 F. 2d 177, 183 (3rd Cir. 1955), that we had a "borderline" case in a matter which involved an assistant chief timekeeper whose responsibility was to see that employees were properly paid and were not allowed to work more than sixteen consecutive hours. That is closer and more substantial than the plaintiff's connection here.[15] [fol. 70] As we remarked in *Shaw v. Monessen Southwestern Ry. Co.*, 200 F. 2d 841, 844 (3rd Cir. 1953), we should be careful not to extend this statute too far. If a plaintiff can prove negligence he may be better off than he would be under workmen's compensation law. But if he cannot, he gets nothing. *Cf.* Pa. Stat. Ann. tit. 77, § 431, § 461 (1952). The hardship of denying recovery to one who was injured but who cannot show the required lack of care on the part of the employer is readily apparent.

We think both from the legislative history and the course of decision that we should not extend the application of the statute to cover this case.[16]

The decision of the district court will be affirmed.

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[15] *Cf.* Holl v. Southern Pac. Co., 71 F. Supp. 21 (N. D. Cal. 1947), where it was held that the act did not cover a clerk filling out forms in a freight claims department.

[16] We do not see that the citation of cases on the application of the Fair Labor Standards Act, 52 Stat. 1060 (1938),

Biggs, Chief Judge, dissenting:

The plaintiff was employed in a department of the defendant Railroad where approximately 325,000 original tracings are on file. These tracings are master prints which cover "all mechanical equipment, cars, locomotives, trains, etc., and all types of structures including bridges, trackage, etc." used or maintained on the defendant's interstate system. Blueprints are made from the master prints. It was the duty of the plaintiff, from time to time, to remove master prints from the files, take them to another employee who [fol. 71] would blueprint them, and return them to the files. The blueprints would then be sent to various points.

The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also betwen the relative importance of employees' positions as affecting transportation. Such an interpretation does not seem to be in accordance with the 1939 amendment to the Federal Employers' Liability Act, 45 USCA § 51, 53 Stat. 1404. The duties of the plaintiff, like those of everyone else employed in the same department, furthered interstate commerce. It should be noted that a disjunctive "or" follows the first semi-colon of the amendment and, if the statute be read literally, as I think it must, furtherance of interstate commerce suffices to bring

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as amended, 29 U. S. C. § 201-219 (1952), is helpful. The test there is whether an employee is engaged in commerce or in the production of goods for commerce. Cases cited by appellant, *e. g.*, Martino v. Michigan Window Cleaning Co., 327 U. S. 173 (1946), involve the admitedly extensive phrase, production of goods for commerce, quite a different question from what we have here. In Overstreet v. North Shore Corp., 318 U. S. 125 (1943), the Court held that, when construing the "engaged in commerce" clause under the Fair Labor Standards Act, cases interpreting its counterpart under the Federal Employers' Liability Act, before the 1939 amendment, were helpful. Contrary to appellant's suggestion, we are not required by this holding, when construing the amended Liability Act, to give weight to cases interpreting the "production of goods" phrase under the Fair Labor Standards Act.

an employee within the purview of the amendment: it is not necessary that that employment "directly or closely and substantially" affect interstate commerce. As was pointed out by the Superior Court of Pennsylvania, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605 (1944), the amending language "is very comprehensive, so inclusive indeed that most railroad employees come within its scope." Such a result may be unfortunate but seems to have been the intention of Congress.

I would reverse the judgment of the court below.

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[fol. 72] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,600

MARTHA C. REED, Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, Chief Judge, and Maris and Goodrich, Circuit Judges.

JUDGMENT—November 17, 1955

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Ida O. Creskoff, Clerk.

November 17, 1955.

[fol. 73] MANDATE (Omitted in Printing)

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[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 27, 1956

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. The case is transferred to the summary calendar and advanced and assigned for argument immediately following No. 257.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

# Supreme Court of the United States

October Term, 1955.

No. 621.

MARTHA C. REED,
*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOSEPH S. LORD, III,
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## TABLE OF CASES CITED (Continued).



## TABLE OF AUTHORITIES.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1955.

No.

MARTHA C. REED,

*Petitioner,*

*v.*

THE PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:*

MARTHA C. REED, by her attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 17, 1955.

## OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in — Fed. 2d — (C. A. 3, 1955). This is the final judgment of the United States Court of Appeals for the Third Circuit, where judgment was entered for the defendant affirming

the judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing the complaint herein. Chief Judge Biggs dissented.

## JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 17, 1955. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

## QUESTIONS PRESENTED.

1. Where the undisputed facts reveal that the duties of an office employee of an interstate railroad require her to fill orders from all the shops of its 12-state system by going among files containing 325,000 original tracings of the entire mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage of said system, locating the necessary tracings, delivering them to printmakers for duplication into working blueprints for the shops of the entire system, and thereafter replacing the said tracings in their proper places, is not the Court of Appeals, which is in conflict with this Court, itself, other Courts of Appeals, and state courts of last resort, arbitrarily and capriciously in error in holding that such employee was not within the purview of the Federal Employers' Liability Act, 45 U. S. C. Sec. 51, on grounds that her duties neither further nor directly closely and substantially affect interstate commerce?

2. Is not the Court of Appeals in error in so construing the 1939 Amendment to the Federal Employers' Liability Act, 45 U. S. C. Section 51 [Aug. 11, 1939, c. 685, 53 Stat. 1404], as to differentiate between office workers and employees engaged in actual transportation, and also between the relative importance of employees' positions as affecting transportation?

## THE STATUTE INVOLVED.

1. The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404], the pertinent portion of which reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

## STATEMENT OF THE CASE.

On July 15, 1951 while the petitioner, Martha C. Reed, was in the drafting room on the 5th floor of the respondent's 32nd Street Building in Philadelphia, Pa., one of the windows which for a long time had been cracked diagonally from top to bottom blew in upon her, causing her serious personal injuries (30a, 31a).

At the time of the aforesaid accident, the petitioner was employed by the respondent as a "print maker" at the aforesaid building (22a). Her duties consisted of filing original structural tracings of tracks, cars, engines and parts therefor (19a). The department in which the petitioner was employed had approximately 325,000 original tracings on file (20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all other types of structures including bridges and trackage (23a). The respondent's entire system is embraced within the blueprints made from the trac-

ings; that is, its entire physical plant which is found in Pennsylvania, Michigan, New York, New Jersey, Delaware, Maryland, Washington, D. C., Ohio, Indiana, Illinois and Missouri (20a). The 32nd Street Building where petitioner worked is the only place on respondent's entire system where these tracings are kept or where prints are made (14a, 20a).

Approximately 67% of the blueprints are sent by the respondent to shops in states other than Pennsylvania (20a). The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a), and the blueprints go to wherever the respondent runs (47a).

The shops in the respondent's system which are engaged in keeping the system operating send in orders (27a) for blueprints from which they conduct their operations. The petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by going from file to file (23a), locating the necessary tracings and delivering them to the print makers for duplication (28a). It is also her function and responsibility to replace in their proper places the original tracings when they have been duplicated (28a).

The complaint in this case was filed July 23, 1953 (1a). The petitioner's deposition was taken on September 10, 1953 (21a). Almost a year and a half later the respondent moved to dismiss the action on the ground that the petitioner's claim was not within the Federal Employers' Liability Act and there was no other ground for federal jurisdiction (55a, 56a). On March 17, 1955 an Order was entered by Chief Judge Kirkpatrick of the United States District Court for the Eastern District of Pennsylvania, dismissing the action with costs (59a).

On appeal to the United States Court of Appeals for the Third Circuit, judgment was entered for the respondent-defendant upon the unwarranted ground that the Fed-

eral Employers' Liability Act, 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65] as amended by the 1939 Amendment [53 Stat. 1404 (1939), 45 U. S. C. § 51 (1952)] was not broad enough to cover this case.

Chief Judge Biggs of the United States Court of Appeals for the Third Circuit dissented from the decision on grounds that petitioner-plaintiff's duties furthered interstate commerce and as such fell within the purview of the aforesaid 1939 amendment. This petition for certiorari follows.

## REASONS FOR GRANTING THE WRIT.

For the purpose of clarity, a short statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resumé.

1. *Southern Pacific v. Gileo; Southern Pacific v. Moreno; Southern Pacific v. Aranda; Southern Pacific v. Eufrazia; Southern Pacific v. Eelk*, certiorari granted Oct. 10, 1955, Docket No. 257 which are now awaiting decision in this Court present the same large and novel question as the case at bar—the scope of the 1939 Amendment to the Federal Employers' Liability Act. The facts at bar would place before the Court that large occupational grouping which, along with the *Gileo* cases, would present a rounded set of job-types from which a full and much needed answer to the question can be formulated.

2. This decision is in conflict with the decision of this Court in *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947).

3. This decision is in conflict with the decision of the same Court of Appeals in *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955).

4. This decision is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Thomas v. Union Railway Co.*, 216 F. 2d 18 (C. A. 6, 1954).

5. This decision is in conflict with decisions of the state courts of last resort in *Ericksen v. Southern Pacific Co.*, 39 Calif. 2d 374, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952); *Harris v. Missouri Pac. R.*, 158 Kan. 679, 149 P. 2d 342 (1944); *Jordan v. Baltimore and Ohio Railroad Company*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

6. A definitive survey of the bounds of said 1939 Amendment is necessary to determine which of the exclusively alternative remedies of state workmen's compensation or Federal Employers' Liability Act right of action is available to large numbers of carrier employees since their redress for industrial accidents has now been rendered uncertain by this decision of the majority of the United States Court of Appeals for the Third Circuit.

7. This decision, unless corrected, will inevitably and rapidly generate a flood of additional litigation and appeals on the separate issue of interstate commerce in most suits under the Federal Employers' Liability Act.

## ARGUMENT.

### Point I.

**Petitioner's Duties as Respondent's Employee Were the Furtherance of Interstate Commerce, and They Directly or Closely and Substantially Affected Such Commerce in the Authoritative Sense of Those Terms. She Is Therefore Within the Ambit of 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].**

One of the two major sources of error in the decision of the majority of the Court of Appeals is fundamentally definitional and arises from its barren answer to the crucial question of what is meant by "interstate commerce" as used in the 1939 Amendment to the Federal Employers' Liability Act.

The majority has suggested in footnote 10 of its opinion that interstate commerce under the Act is interstate "transportation" as such, thereby placing itself in direct conflict with *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 601, 34 A. 2d 221 (1943); and *Ericksen v. Southern Pacific Co.*, 234 P. 2d 279 (Cal., 1951). "Indeed", it states, "the interstate commerce involved in railroading is transportation", citing therefor portions of S. Rep. No. 661, 76th Cong. 1st Sess. 2, 3 (1939) [1] (at page 30).

We have exhausted the legislative history of the provision of the 1939 Amendment in issue in this case, and a thorough reading of it reveals how completely useless it is as an aid in resolving the issue at bar. For instance, the very document relied upon by the majority in its footnote 10 as a basis for its holding that commerce is transportation contains material, not mentioned by the majority,

1. At this printing the opinion of the Court of Appeals is not officially reported. All subsequent references thereto are to the opinion as paginated in the "Appendix" *infra*.

which negatives the inference drawn by the majority and supports the construction we urge. For instance, S. Rep., No. 661, 76th Cong., 1st Sess. 2, 3 provides, *inter alia:*

> "It is the aim of the bill to amend the Employers' Liability Act in three particulars:
>
> "1. It broadens and clarifies the law in its application to *employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.*" (Emphasis supplied.)

So too the majority, in drawing its conclusion about the scope of the Amendment, quotes from and obviously relies heavily upon certain testimony which Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, gave before the Sub-Committee of the Senate Committee considering the then proposed Amendment.

It is far from clear to us why the majority leans upon that testimony in view of Mr. McGrath's later testimony (also unquoted by the majority) at the same hearings that:

> "I did not draw the amendments and do not know who did. I have not given them close study and deep thought but I infer that it was probably given pretty close scrutiny by someone."[2]

In the light of Mr. McGrath's most frank admission, why does the majority quote him to answer the question at the very heart of this case: How much did the 1939 Amendment enlarge the coverage of the Act? The answer must lie in areas more authoritative than this kind of completely inconclusive legislative history.

Assuming *pro arguendo* that transportation is the commerce contemplated by Congress in the enactment of the 1939 Amendment, was any part of petitioner's duties, in the

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2. *Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess. on S. 1708, at 76 (1939). This is, of course, the same document cited in the majority opinion's footnote 8.

language of the Amendment "the furtherance of interstate or foreign commerce (read: transportation); or . . . [did any part] in any way directly or closely and substantially affect such commerce" (read: transportation)?

Having said that the contemplated commerce is transportation, the majority of the Court of Appeals then leaves the matter there. But this, of course, is fruitless tautology since the substitution of one term for another merely begs the question: What is transportation? One looks in vain for the Court's express answer to the question so squarely raised by the substitution of terms.

In all candor, we must ask: is there a difference in the meaning of these terms interstate commerce and transportation?

We urge that a difference there is. It is substantial and the cases in which the terms have been used underscore that difference. In essence it is one of the breadth of concept of the scope of the 1939 Amendment. If the cases are read with a view toward this differentiation it becomes apparent that there are two conflicting views of the effect of the 1939 Amendment.

One view is symbolized by the term "interstate transportation" which has really been used by the majority of the Court of Appeals as a designation of the employee's physical proximity to the classical stuff of railroading: throbbing pistons, the hiss of air in a brake assembly, rattling couplers and rolling stock on flashing rails. Were this view articulated, it would state that to be engaged in interstate transportation is to be physically near and quite directly in actual contact with the materiel which makes the haul.

If the majority's opinion is read with such a premise in mind, it is very clear that the opinion evolves in a manner totally consistent with that premise. Note, for instance, that "transportation" replaces "commerce" and is then left undefined. What is the purpose of substituting terms if it does not advance the meaning of either of them? But

observe that "transportation" has much more the flavor of railroading than "commerce".

In the same mood, the majority raises and then disposes of various examples of employees—the copy writer; printer; typist in the President's office or the clerk who makes out the checks—by stating "Yet all this is a far cry from transportation" (at page 30). Is it? How can that be said until the meaning of "transportation" is known? However, a definition is never expressly laid down by the majority. Nonetheless, that parade of carrier personnel could be summarily excluded without difficulty or hesitation from Federal Employers' Liability Act coverage if this truncated view of the 1939 Amendment were adopted. Obviously that has been done. Note that the majority views with alarm the dictionary application of the word "furtherance" for it would "sweep all employees of interstate railroads into the group covered by the statute" (at page 30). Its concern for this result is generated by the set of symbols of the aforementioned group of workers not a single one of whom is begrimed with railroad soot.

The clinching justification for urging this as the majority's unstated premise is its remarkable reversal of the holding of the same Court in *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955) a detailed comparative analysis of which appears *infra* under Point II. As we shall indicate the *Straub* case, which also involved a white-collar worker, presented a set of facts considerably more attenuated than those at bar, yet they properly yielded Federal Employers' Liability Act coverage while the present facts are held not to. In its withdrawal from the correct holding of the *Straub* case and the authorities grounding that decision, the majority has created a dissonance which simply cannot be harmonized by asserting that these are *ad hoc* adjudications. In fact, the present decision represents a major shift in the Third Circuit's theory of the scope of the 1939 Amendment.

This view of the 1939 Amendment simply has no foundation. The disposition apparently rests on nothing but *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (D. C. N. D. Cal. 1947) which is at least subject to the fair observation that it is factually unrelated to this case except that both plaintiffs are office workers. As we indicate in Point II, that fact alone should be immaterial.

Furthermore, the unstated premise which permeates the majority's opinion runs throughout the *Holl* opinion: a view that the 1939 Amendment simply could not encompass the white-collar worker. Note, for instance, the language at page 23 of the *Holl* case:

> "If [plaintiff] comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. *And so, for that matter, does every other clerical employee in the department.* I do not think that it was the intention of the Congress to include *such employees* and to withdraw them from the protection of State Employer's Liability Laws." (Emphasis supplied.)

A fair paraphrase of this language is that a clerical employee, *as such,* cannot fall within the 1939 Amendment, for the Court simply excludes "such employees" without so much as qualifying its blanket conclusion with the real contingency that others of "such employees" may have duties fulfilling either of the disjunctive clauses of the 1939 Amendment. But this contingency simply cannot exist if the "transportation" view of commerce is applied. Indeed, that Court, as the majority here, never has to go into the question of the true nature of the employee's duties.

The *Holl* Court continues at page 23:

> "On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in*

> *such commerce.'* This would have extended the Act to 'any person suffering injury while he is employed by such carrier', and would have placed *all employees of interstate railroads under the Act*, **whether their work be clerical or not**, or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier.* (Boldface emphasis supplied.)

The boldface emphasis: "whether their work be clerical or not" is, we respectfully submit, a complete confirmation that it is the "workshirt" view of the 1939 Amendment to which the *Holl* Court subscribes. It is clerical work *qua* clerical work which that Court simply cannot subsume in its theory of the Act.

As if this were not proof enough of that Court's unstated premise, observe its catalogue of cases at page 24 of the opinion as to which the Court states at page 24:

> "It is quite evident that each of the employees just mentioned, whether *switchman, brakeman, trackman, repairman, or oilman*, was performing a function connected directly with, or which affected, interstate commerce. Each was doing something in furtherance of interstate commerce, whether he was assisting in the preparation or preservation of *rolling stock, equipment, roadbeds, instrumentalities, accessories or materials* used for repairs. And each was furthering, i.e., *promoting* or helping along, present or future interstate commerce. (First two emphases supplied.)

Without exception, these examples have the full flavor of railroading in the literal, constricted sense of the term.

Note finally the Court's emphasis on the word "promoting" as a synonym for "furthering". This was one of the words (i.e., "promotion"), that the majority of the Court of Appeals fled from because it felt that an application of a dictionary term such as this "will sweep all em-

ployees of interstate railroads into the group covered by the statute".

We submit that the same erroneous unstated premise which runs through the majority opinion infects the *Holl* opinion as well. Together, these cases conflict markedly with the remedial intent of the 1939 Amendment and indeed with respect to the word "promotion" they are at war with each other.

The holdings in *Straub v. Reading Co., supra,* and *Lillie v. Thompson,* 332 U. S. 459, 68 S. Ct. 140 (1947) show without doubt that a white collar is no bar to Federal Employers' Liability Act coverage. See also *Bowers v. Wabash Railroad,* 246 S. W. 2d 535 (Mo. App. 1952) and *Thomas v. Union Railway Co.,* 216 F. 2d 18 (C. A. 6, 1954). All of these cases were cited in the appeal below, but appear to have had no effect in preventing the majority from indulging this pinched theory of the 1939 Amendment.

In sharp contradistinction to the "interstate transportation" concept is the great weight of authority hewing to the "interstate commerce" theory the essence of which is that coverage under the 1939 Amendment is circumscribed not by a ribbon of rails, but by that totality of carrier employees' work processes which result in the interstate movement of men and goods on those rails.

Unlike the majority's view of the 1939 Amendment, the concept finds nothing inherently difficult about covering the white-collar job under the Amendment since it is not physical proximity to a roadbed but the nature of the work process which sets the limits of coverage. Thus, under this theory of the Act, it is perfectly conceivable and indeed the Act contemplates that a "clerical" worker can have duties which, in the language of the 1939 Amendment, "shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce."

If, as we submit, these are significantly dissimilar and conflicting theories of the scope of the 1939 Amendment,

then it is of great importance both to the Third Circuit and courts throughout the nation to determine from more authoritative sources than those suggested by the majority which of these conflicting views is justified by the intent of Congress in its enactment of the 1939 Amendment. (And, of course, so long as the differences are exposed, it ultimately matters not how the views are labeled: commerce equals transportation or commerce equals commerce.)

We respectfully urge that the latter full view of the 1939 Amendment is the only one consonant with Congressional intent. It is now long-settled law that the 1939 Amendment was a great broadening of the FELA, eliminating as it did the old "moment of injury" test and the "intimate and integral part" of interstate transportation view of the Act. *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 601, 34 A. 2d 221 (1943); *Southern Pacific Co. v. Industrial Accident Commission*, 19 Cal. 2d 271, 120 P. 2d 880 (1942). The backshop cases[3] can only be explained by this ex-

3. Harris v. Missouri Pac. R. Co., 158 Kan. 679, 149 P. 2d 342 (1944); Trucco v. Erie R. Co., 353 Pa. 320, 45 A. 2d 20 (1946); Jordan v. Baltimore and Ohio Railroad Company, 62 S. E. 2d 806 (1950); Baltimore and Ohio Railroad Company v. Rodeheaver, 81 A. 2d 63 (1951); McGuigan v. S. Pac., 247 P. 2d 415 (1952); Baird, et al. v. New York Central R. R., 86 N. E. 2d 567 (N. Y. 1949); Wills v. Terminal R. R. Ass'n. of St. Louis, 239 Mo. App. 1144, 205 S. E. 2d 942 (St. Louis Court of Appeals, 1947); Pauley v. McCarthy, 166 P. 2d 501 (Utah, 1946); Murphy v. Boston and Maine R. R., 65 N. E. 2d 923 (Illinois, 1946); Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062 (1943); Ermin v. P. R. R., 36 F. Supp. 936, 940 (D. C. E. D. N. Y., 1941); Ernhart v Elgin J. & E. Ry. Co., 84 N. E. 2d 868, 337 Ill. App. 56 (Ill., 1949); affirmed 92 N. E. 2d 96, 405 Ill. 577; Prader v. P. R. R., 49 N. E. 2d 387 (Ind., 1943); Rainwater v. Chicago, R. I. & P. Ry. Co., 21 So. 2d 872 (La., 1945); Agostino v. P. R. R., 50 F. Supp. 726 (D.C.E.D.N.Y., 1943); Albright v. P. R. R., 37 A. 2d 870 (Md., 1944), cert. den. 323 U. S. 735, 65 S. Ct. 72; Desper v. Starved Rock Ferry Co., 342 U. S. 187, 72 S. Ct. 216 (Ill., 1952); Scarborough v. P. R. R., 154 Pa. Super. 129 (1943); Wright v. New York Central Railroad Co., 33 N. Y. Supp. 2d 531 (N. Y., 1942); Edwards v. Baltimore & Ohio Railroad Co., 131 F. 2d 366 (C. C. A. 7, 1942); Cheffey v. P. R. R., 79 F. Supp. 252 (D. C. E. D. Pa., 1948).

panded ambit of the Statute. The restricted concept of coverage effected by the majority of the Court of Appeals in the case at bar is an unauthorized surgery upon the 1939 Amendment which, if permitted to go uncorrected by this Court, will leave a misshapen statute which Congress never intended.

The unwarranted excision appears very clearly in the majority's opinion. It notes, initially, that "the two clauses [in the 1939 Amendment] are in the disjunctive." Many FELA cases, exemplified by *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954), substantiate that construction.

But the majority thereafter refuses to reason to the conclusion to which those disjunctive phrases lead. Having observed the dictionary definitions of the word "furtherance", the majority will not apply them accordingly for fear "that a literal dictionary application of the word will sweep all employees of interstate railroads into the group covered by the statute". Is there something amiss with such an effect in the light of Chief Judge Biggs' accurately dissenting observation at page 35?

> "As was pointed out by the Superior Court of Pennsylvania, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605 (1944), the amending language is very comprehensive, so inclusive indeed that most railroad employees come within its scope. Such a result may be unfortunate but seems to have been the intention of Congress."

Beyond this, the former Acting Solicitor General of the United States, Robert L. Stern, Esq. observes in his 1955 Ross Prize Essay, "The Scope of the Phrase Interstate Commerce", 41 A. B. A. L. J. 823, 873 (Sept. 1955):

> "Use of the phrase 'interstate commerce' [in certain other statutes], however, affords no basis for changing the meaning of the constitutional expression. Since such statutes do not exhaust Congress' constitutional

authority, Congress has ample power to expand or contract statutory coverage by amendment, without redefining the constitutional phrase. That was what happened to the Federal Employers' Liability Act, which originally applied only to injuries to employees engaged in interstate commerce [citation]... The over-refinements [citation] which resulted from judicial interpretation of that phrase [citation] led to the replacement of the 'in commerce' test by language which covered *all* railroad employees [citation]." (Emphasis supplied.)

Having refused to apply the "furtherance" clause as it was intended, the majority holds that " 'furtherance' was meant to cover those in the actual business of transportation itself and the second clause was to cover the fringes" (at page 31).

We have identified the "transportation" theory for what it really is and find no sound basis either for that view of the scope of the Amendment or the majority's construction that the second clause was the broader of the two because it "was to cover the fringes", for as Chief Judge Biggs properly notes in effect in his dissent, the disjunctives are alternative modes of qualifying for coverage. There is no authoritative reason for holding that one clause is broader than the other.

The majority's reading not only runs afoul of settled authorities, but is grossly inadequate on its own terms. Even if we assume *pro arguendo* that that construction of "commerce" is justified, immediate and fatal difficulties arise. It must follow that if "the actual business of transportation" itself were the limitation of the first clause that the majority says it is, then the "fringes" meant to be covered by the second clause, touch or involve something in addition to, beyond, or other than such transportation. What is it? By what legal standards are injured carrier employees' rights now to be determined under this view of the 1939 Amendment?

If something other than or beyond "the actual business of transportation" is comprehended by the second clause, to what do that clause's words "in any way . . . affect such commerce" refer? Grammatically, what is "such commerce" if not the alleged "actual business of transportation"? And yet, logically, this cannot be for the majority has said that the phrase from which it comes is broader than the referent first disjunctive phrase "such commerce".

We earnestly submit that grammatically, logically and historically the interpretation is embarrassing and patently impossible. If it is allowed to stand, it must breed widespread confusion, uncertainty and unnecessary litigation and appeals. The disorder will hobble a set of, until now, clear and effective remedies for the class intended to be covered by the remedial legislation of the 1939 Amendment.

## Point II.

**A Carrier Employee's Job Function, and Not the Relative Importance of His Work or Status, Is the Sole Determinant of Coverage Under 45 U. S. C. Section 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].**

As indicated *supra*, the opinion of the majority of the Court of Appeals places an erroneous construction upon 45 U. S. C. Section 51. An accurate construction renders the effective coverage of the 1939 Amendment much broader than the majority was willing to recognize thus insuring that carrier employees shall have available to them the remedies Congress intended they have.

As we have argued, the error of the majority arises from unwarranted statutory construction. The other source of error is in an area where two distinct and unrelated sets of inferences can be drawn from the same set of facts in a case such as this; *inferences of job status and inferences of job function.*

The large and legally irrelevant inference used both by the respondent and the majority in the opinion of the Court of Appeals is that petitioner's job is a relatively unimportant one in the hierarchy of railroad affairs, and the majority of Court seems further concerned by the fact that petitioner is an office worker (see its analogizing examples covering only office workers). These are inferences of status and importance and have with utterly no justification been made one of the legal bases for excluding petitioner from the coverage of the 1939 Amendment to the F. E. L. A.

In his dissent from the Court of Appeals' decision, Chief Judge Biggs fixed upon this when he stated at pages 34-35.

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also *between the relative importance of employees' positions as affecting transportation.*" (Emphasis supplied.)

In its discussion of the facts of this case, the majority of the Court of Appeals excludes petitioner from coverage under the 1939 Amendment by linking her status with that of "a messenger boy" at the end of a "dire chain of catastrophe" and remarking "One is reminded of the old rhyme 'for want of a nail the shoe was lost' " (at page 33).

It is petitioner's position that indeed such a chain is involved here as in all such FELA cases, and it is to this that a Court must look in testing for applicability of the 1939 Amendment. But the majority, having been correctly reminded of the adage, summarily abandons it and proceeds to the bald assertion, resting on no explicitly reasoned grounds whatsoever, that this case is not covered by the Act.

The "chain of catastrophe" in the old rhyme is a chain of functional relationships, and not some Dantean chain of status in which the petitioner-file clerk is placed one posi-

tion above the messenger boy. The moral of the story is that the battle was lost not because a *private* set off the chain of catastrophe but because the *want of a nail* did. Of what analytical value is the analogy to this case unless it be to the question of the functional relationship of petitioner to interstate commerce? And if that is its intellectual purpose, the fact that the majority of the Court of Appeals abandoned the analysis at the very moment it so productively suggested it is a further indication that a functional analysis was never applied to the facts at bar.

It is our position that the only valid inference to which an inquiry on such facts should be directed is one of *function*. Once the analogy suggested by the majority is posed, there arises the question of petitioner's duties and its answer points clearly to a conclusion of coverage under the Act.

We may designate petitioner a mere file clerk, messenger or by any other job classification. But what in truth are her *duties?* She is indeed engaged in important work which is rendered no less important by the somewhat drab title her job carries. Importance aside (as it should be) the critical fact is that her duties are related to interstate commerce in all those respects comprehended by 45 U. S. C., Section 51.

Petitioner was employed in a department in which approximately 325,000 original tracings were on file (20a). This was the only office in which original tracings were filed (14a, 20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage (23a). This was the only place in respondent's system in which the blueprints were made (14a, 20a). Respondent's entire system is embraced within the blueprints made from the tracings. The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a). Blueprints go to wherever respondent runs (47a). It runs through at least twelve states (20a).

Approximately 67% of the prints are sent beyond Pennsylvania's state line (20a).

It is clear that the master sheets and the blueprints made from them have a direct connection with, and effect upon, interstate commerce. The railroad's interstate system almost literally runs on those documents. From them the respondent's physical plant has been built. Its tracks, bridges and rolling stock are their end product and unquestionably are kept in operation through their continual use in the construction of new equipment and the repair and replacement of worn and broken gear, equipment, cars, locomotives, trackage, depots, power houses and the like. Without them the respondent could never have gone in operation as an interstate carrier and it could not long continue in the stream of interstate commerce were they destroyed or rendered useless or not subject to constant reference for maintenance and repair.

It is in this context that the petitioner, a "file clerk", works. And what precisely is her function? The shops in respondent's system, which are engaged in keeping the system operating, send in orders (27a) for blue prints from which they conduct their operations. Petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by running around from file to file (23a) locating the necessary tracings and delivering them to the printmakers for duplication (28a). It is also her function to replace the original tracings when they have been duplicated (28a).

Thus, it appears that until the tracings are taken out of the dead storage of a file cabinet by someone who knows their location and can get them when they are needed, the tracings are of no use to anyone. It should also be apparent that unless they are accurately replaced in their proper niches, confusion, delay and worse may result when they are needed again by the railroad's shops. Without the tracings the new prints cannot be made. Without the

prints new or extra parts cannot be made. Old ones cannot properly be repaired. The system would grind to a halt, a conclusion in no wise vitiated by the majority's characterization of such a cessation as "dismal" (at page 33).

When seen in this perspective, petitioner's title of "file clerk" tells little if any of the full story of her actual role. The work she does is necessary, vital and important. But these qualities, of themselves, do not necessarily bring her within the ambit of the Federal Employers' Liability Act. We must look to see whether these duties, or any part thereof, "shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially affect such commerce . . ." as the Act requires.

It is our position based upon the reasoning of this Court in *Overstreet v. North Shore Corporation,* 318 U. S. 125, 63 S. Ct. 494 (1943) that a simple, direct and workable test to determine whether these elements are met here lies in the question: "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?" This is but the other side of the 1939 Amendment to the Federal Employers' Liability Act. Eliminate petitioner's function and the answer must be in the affirmative. It does not matter what we call her job. By any title, or no title, were that function eliminated or improperly performed, the vital tracings would not then get up and walk out of the file drawers in which they repose. And so long as they remain there, the prints duplicated from them would never get to the shops which keep the system operating in interstate commerce. Someone must perform this function, else there would unquestionably be an impediment and delay to the furtherance of interstate commerce and an impediment directly, closely and substantially affecting the furtherance of such commerce. Just as the hostler takes the locomotive from the roundhouse to the running tracks, so petitioner takes the tracings from the files to the main-

tenance, repair and construction shops and jobs. Hers is a necessary step. She is a necessary cog.

There can be no doubt that a riveter who drills a hole in an engine is covered. The man who carries the rivet is also certainly covered. Can it possibly matter whether he carries a rivet, a blueprint or a tracing? The important thing is that each is performing a function necessary to interstate commerce. Petitioner here was performing work just as necessary to interstate commerce as the man who carries the blueprint for the riveter and is, therefore, just as he, covered by the Act.

Note, too, that under this test there can be put to rest the traditional concern of where to draw the Federal Employers' Liability Act coverage line. As indicated, *function* and not the misleading labels of job *status* or *title* should control. It can thus be seen that under this test there *are* railroad employees who would not receive Federal Employers' Liability Act coverage. An office worker, as such, (but another label) may or may not be covered. More must be known of the precise function. Petitioner here is an office worker who, we submit, is clearly within the ambit of the Federal Employers' Liability Act.

Notwithstanding this argument and the analysis upon which it is based, the majority of the Court of Appeals has stated at page 33:

> "We think it just as well if we do not try to lay down a litmus test which will give a red or blue reaction to all possible sets of fact."

No such test has been sought of that Court. Petitioner is well aware that the scope of the 1939 Amendment is not a matter of logarithmic certainty. However, to say this is not to concede what in effect has been laid down by the majority of the Court of Appeals as the basis for adjudication: a necessarily arbitrary *ad hoc* disposition resting on no discernible reasoning except a desire to shrink the limits of 1939 Amendment previously and properly author-

ized by the very same Court of Appeals, and virtually every other court in the country.

An examination of the majority's opinion reveals this is not an overstatement of the case. The gist of its adjudication on the facts at bar and the precise point at which it generated intra- and inter-circuit conflicts is found at page 33 where the Court said:

> "We think here that we are being asked to apply the act in a situation which would take us further than any case we have seen. We said in *Straub v. Reading Company*, 220 F. 2d 177, 183 (3rd Cir. 1953), that we had a 'borderline' case in a matter which involved an assistant chief timekeeper whose responsibility was to see that employees were properly paid and were not allowed to work more than sixteen consecutive hours. That is closer and more substantial than the plaintiff's connection here."

If we assume the broad and accurate view of the 1939 Amendment, this quoted portion of the opinion is remarkable, for the facts of the *Straub* case actually extend much closer to the limits of the 1939 Amendment than those of the case at bar. If the construction of the 1939 Amendment previously proposed by the majority is assumed, then the *Straub* case is utterly inexplicable. From the present facts, much less attenuated coverage-wise than *Straub*, the same Court has drawn an opposite conclusion stating simply "That is closer and more substantial than the plaintiff's connection here." Why? Surely the mere statement does not make it so.

It is equally certain that upon an analysis such as that laid down in *Overstreet v. North Shore Corp., supra*, there should be no question that without Straub's functions, the net impact upon interstate commerce would be reflected much more slowly and indirectly than the withdrawal or confusion of petitioner's duties. Straub's duties as assistant timekeeper were "to prevent payroll padding and

to ensure appellant's compliance with the Federal Hours of Service Law" (at page 183). Without the execution of such duties, it is perfectly conceivable that there might be no directly appreciable effect on interstate commerce. That is, employees overseen by Straub might neither pad the payrolls nor work more than sixteen consecutive hours, and even if there were padding and overwork there would still remain the question of what the proximate net effect upon interstate commerce would be. In saying this, we are in no sense questioning the correctness of the *Straub* decision which we respectfully submit was properly decided for reasons we urged upon the Court of Appeals in the argument of that case.

But on the facts at bar, the tracings would not get out of these files unless they were taken therefrom nor would they return unless placed therein. They would not position themselves properly. In a real sense, Straub's duties might be executed by those of his overseen employees who had neither the desire to pad pay rolls nor work beyond the designated time. But here no such execution of petitioner's duties by others is possible. Either she prosecutes them or her work does not get done. And if that work is not done the effect is felt directly, immediately and effectively all through the stream of interstate commerce.

What then can be the rationale for the majority's conclusion that Straub's duties are "closer and more substantial than the plaintiff's connection here?" The explanation must lie in Chief Judge Biggs' cogent observation at pages 34-35 that:

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also between the relative importance of employees' positions as affecting transportation."

For the reasons stated both in Point I, *supra*, and the discussion herein, neither of these differentiations is jus-

tified under the statute. The decision of the majority of the Court of Appeals is a completely erroneous and arbitrary adjudication upon the facts at bar, and is a clearly unauthorized disfigurement of the 1939 Amendment. If not corrected by this Court it can only confound the application of a statute whose integrity demands decisional uniformity and broad, undiminished scope.

The opinion of the majority represents the latest and most significant attempt to shrink the coverage of the FELA. It thereby strips countless numbers of interstate carrier employees of rights which Congress meant to be secured by the enactment of the 1939 Amendment to the FELA. Until the emasculating decisions of the Court of Appeals and the *Holl* court had been rendered, it was thought that the "transportation" argument had been permanently discredited by cases such as *McFadden v. Pennsylvania R. Co., supra*, and the many back-shop cases following it.

Subsequent attempts to chop away at the FELA came in the form of a challenge that the repair was not being made *directly* to an artery of interstate commerce. *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) stopped that attempt to impair the effect of the FELA There followed another effort to narrow the scope of the FELA through the argument that only persons engaged in physical labor were protected by the Act. This, too, failed, *Straub v. Reading Company, supra.*

Once again, the threat of unauthorized statutory surgery is posed by the decision of the Court of Appeals.

With the cases of *Southern Pacific v. Gileo, et al.*, (Docket No. 257) now awaiting argument before this Court, there has finally been raised in this forum the question of the scope of the 1939 Amendment. The facts of those cases embrace backshop workers. The other large area ripe for the consideration of this Court is symbolized by petitioner's job as an office worker. We respectfully submit that like the backshop worker, the office worker such as petitioner is within the coverage of the FELA, for the

proper test should indifferently comprehend all places of work in a carrier's system, and all ranks of personnel. It should look solely to the true nature of the employee's job function.

By granting certiorari in this case the Court would have a full set of cases and comprehensive facts so that at one time the much-needed authoritative construction of the scope of the 1939 Amendment could be roundly drawn. In so doing, the palpable error of the decision of the United States Court of Appeals could be erased, confusion both within and without that Circuit corrected and avoided in future rulings in this vast and important field of law. Not to grant certiorari and reverse here means an avalanche of cases litigated as to coverage which will crowd our courts with all the uncertainties of the nightmarish pre-1939 days. See the host of pre-1939 cases annotated at 45 U. S. C. A. § 51 [1954 ed.], notes 263, 1116, 1117, 1118.

## CONCLUSION.

Petitioner's duties fell squarely within the scope of the 1939 Amendment to 45 U. S. C., Section 51 in the authoritative sense in which the Amendment has been construed and applied. By affirming the judgment of the District Court dismissing the complaint herein, the Court of Appeals has thus committed serious error which, if uncorrected by this Court, will deprive the petitioner of rights vouchsafed by a solemn act of Congress, ramify into a grave distortion and confusion in the interpretation and application of the FELA in courts across the entire nation, and deprive countless other employees of interstate carriers of the benefits of this remedial legislation.

This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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RICHTER, LORD, FARAGE & LEVY,
*Counsel for Petitioner.*

# APPENDIX.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 11,600

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MARTHA C. REED,

*Appellant*

*v.*

PENNSYLVANIA RAILROAD COMPANY

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Argued October 7, 1955

Before BIGGS, *Chief Judge*, and MARIS and GOODRICH, *Circuit Judges*.

## OPINION OF THE COURT
(Filed November 17, 1955)

By GOODRICH, Circuit Judge.

This case involves the application of the Federal Employers' Liability Act [1] and its 1939 amendment.[2]

The plaintiff was injured when a window in the Thirty-Second Street office building of the Pennsylvania Railroad blew in upon her during a storm. She was at the time engaged in her work for the Pennsylvania. Her job was to serve as custodian of the files of master sheets from which blueprints were made. The subject matter of the blueprints was any part of locomotives, freight cars or other things used in the business of railroading. When an order came from some point on the railroad's system asking for a blueprint of one of the tracings in the file, it was plaintiff's task to find the tracing there and take it to the blueprint maker, returning the tracing to the files when the blueprint maker was through with it. There is no substantial dispute on the facts. The sole question involved in the case is whether this plaintiff, when injured during the performance of her duties for the railroad, is within the scope of the Federal Employers' Liability Act and its amendment.[3]

The language which must be looked at is that of the 1939 amendment to the statute. The history of the original statute of 1906 and its 1908 successor does not need to be discussed at length here. The 1906 act was considered by the Supreme Court to have gone too far and was declared unconstitutional.[4] The 1908 statute was designed to

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1 35 STAT. 65 (1908), as amended, 45 U.S.C. § 51-60 (1952).

2 53 STAT. 1404 (1939); 45 U.S.C. § 51, 54, 56, 60 (1952).

3 Answering this question in the negative, the court below granted defendant's motion to dismiss. Reed v. Pennsylvania R. R. Co., Civil No. 15591, E.D. Pa., March 17, 1955.

4 The Employers' Liability Cases, 207 U.S. 463 (1908).

meet the constitutional difficulties which the Court had considered in the 1906 act.[5] Many cases were decided under the 1908 act. They can be summarized sufficiently accurately for the discussion here by saying that what was required was "on the spot" participation in transportation.[6]

The 1939 amendment was designed to enlarge the coverage of the act.[7] How much did it enlarge it? Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, said in advocating its adoption:

> "Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act . . . .*" (Italics ours.)[8]

The pertinent language of the amendment [53 STAT. 1404 (1939), 45 U.S.C. § 51 (1952)] says:

> "Any employee of a carrier, *any part of whose duties* as such employee *shall be the furtherance of interstate or foreign commerce;* or shall, *in any way directly or closely and substantially, affect such commerce* as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Italics ours.)

It is to be noted that the two clauses are in the disjunctive. Each contains language from which one can get out

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5 Second Employers' Liability Cases, 223 U.S. 1, 51 (1912).

6 See, *e.g.*, Shanks v. Delaware, Lack. & West. R. R., 239 U.S. 556, 558 (1916), where the test was held to be whether "the employé at the time of the injury [was] engaged in interstate transportation or in work so closely related to it as to be practically a part of it . . ."

7 Robinson v. Pennsylvania R. R. Co., 214 F.2d 798, 799 (3rd Cir. 1954).

8 *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess., on S. 1708, at 8 (1939).

as much as he cares to put in it. Take the word "furtherance," for instance, in the first clause. If one looks up furtherance in the dictionary he finds it is defined as "the act of helping forward," "promotion," "advancement," "progress."[9] It is quite clear, is it not, that a literal dictionary application of the word will sweep all employees of interstate railroads into the group covered by the statute. Take the copy writer who is penning an advertisement of the beauties of travel on the Broadway Limited on its trip from New York to Chicago and who suffers injuries when his desk chair collapses. Certainly the very object of his word painting is the promotion of more passenger business for the Pennsylvania on its crack interstate train. The same thing is true, is it not, of the printer who sets up the type or tends the press on the timetables for the Pennsylvania's interstate trains. His product is to help business by telling passengers when to get on trains and when to get off. Yet all this is a far cry from transportation itself;[10] as much so as the typist in the president's office who writes a letter on a railroad matter, or the clerk who makes out the checks for the treasurer to sign.

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9 WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. unabr. 1941).

10 Relying on McFadden v. Pennsylvania R. R. Co., 130 N.J.L. 601, 34 A.2d 221 (1943), appellant argues that under the amendment the employee's relationship to interstate commerce, rather than interstate transportation, is controlling. Yet she fails to point to any effect which her duties might have had on an aspect of interstate commerce other than interstate transportation. Indeed the interstate commerce involved in railroading is transportation. The Senate committee report indicates that the attention of the legislators was on transportation and transportation employees.

"This amendment is intended to broaden the scope of the Employer's Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

"

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are con-

If "furtherance" means in the statute everything that its dictionary listings include, the second clause of the section is meaningless repetition. The whole field has been covered already. In view of the constitutional difficulties which the legislators found in the "affect" phrase, and the limitations they placed upon it, to be discussed in a moment, it is incredible to conclude that they were intending a scope for the first clause which is as broad as all out of doors. It is much more likely that the second clause is the broader and that "furtherance" was meant to cover those in the actual business of transportation itself [11] and the second clause was to cover the fringes.

We come then to the second clause in the amendment which brings in an employee whose duties either "directly" or "closely and substantially" affect interstate commerce.

This language had a very interesting legislative history. The first proposal made in the Senate bill was to have the coverage of every employee whose work "in any way affected" interstate commerce. This was later modified to meet what was at the time thought to be a constitutional difficulty and the "directly" or "closely and substantially" modification appeared in the final bill.[12] That

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stantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." S. REP. No. 661, 76th Cong., 1st Sess. 2, 3 (1939).

11 It would appear that the "furtherance" clause was included to codify certain holdings under the 1908 statute. See, *e.g.*, Hines v. Wicks, 220 S.W. 581 (Tex. Civ. App. 1920), where it was held that an employee hauling out of state baggage from a train to a baggage room was furthering interstate transportation and within the limited coverage of the 1908 act. See also, Antonio v. Pennsylvania R. R. Co., 155 Pa. Super. 277, 38 A.2d 705 (1944).

12 During the hearings, Senator Austin said, in support of his motion to make the substitution:

["Directly" or "closely and substantially"] "occur and recur in many cases of recent date as defining what kind of effect on interstate is comprehended by the commerce clause of the Constitution. . . .

"[They embody] the law as it is interpreted by the Supreme Court of the United States in National Labor Relations Board against Jones &

a broader reading of the then recently decided Labor Relations Act case would have indicated to the draftsmen that a constitutional difficulty did not exist,[13] is immaterial. They did not so interpret it.[14] Instead they left to courts the problem of what is "directly" or "closely and substantially."

We need not worry much about the "directly" part of the clause. What is direct is not entirely sun-clear but is much easier to categorize than the second phrase, "closely and substantially."

In trying to decide what these words mean one is immediately reminded of the trackless maze of "proximate" cause questions in the law of Torts. The words are not capable of precise definition and it is likely they were not meant to be. Here was left an area for courts to deal with sets of facts as they arose and to give an interpretation which would not push the act so far as to encounter constitutional difficulties.

The plaintiff urges that an employee's occupation closely and substantially affects interstate commerce if that employee's activities are such that without it interstate commerce would stop or be interrupted. From that

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Laughlin Steel Corporation [301 U.S. 1, 37 (1937)]; in the Bituminous Coal Conservation Act of 1935, in connection with N.R.A. Codes, and in Carter versus Carter Coal Co. [298 U.S. 238 (1936)], and others. . . ." *Hearings, supra* note 8, at 58, 64.

Another noteworthy change in the original bill occurred during the Senate hearings. The first proposal would have included within the coverage of the statute "Any employee . . . whose duties . . . shall be in any degree incidental [to interstate commerce] . . ." *Hearings, supra* note 8, at 2. This clause, which might well have extended the applicability of the statute beyond the "directly or closely and substantially affect" phrase, was eliminated from the final bill, apparently because of the constitutional difficulties thought to be involved. See *Hearings, supra* note 8, at 64.

13 In National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court held constitutional a statute which on its face covers activities merely "affecting" interstate commerce.

14 See note 12 *supra*.

it is argued that if Miss Reed failed to bring an ordered tracing from the file to the blueprint maker, the print for the locomotive wheel would not get to the machine shop; if it did not get to the machine shop, the repairs would not be made; if the repairs were not made, the locomotive or car could not run. If the locomotive or car could not run, interstate commerce would be, to that extent, interrupted. And if enough such omissions occurred, transportation on the great Pennsylvania system would grind to a dismal halt. Now of course that is true. But it is equally true that if the messenger boy who was supposed to pick up the letters containing the blueprints, addressed to the various shops throughout the railroad system, failed to pick them up and mail them, the same thing would happen. One is reminded of the old rhyme "for want of a nail the shoe was lost" and its dire chain of catastrophe.

We think it just as well if we do not try to lay down a litmus test which will give a red or blue reaction to all possible sets of fact. We think here that we are being asked to apply the act in a situation which would take us further than any case we have seen. We said in *Straub v. Reading Company*, 220 F.2d 177, 183 (3rd Cir. 1955), that we had a "borderline" case in a matter which involved an assistant chief timekeeper whose responsibility was to see that employees were properly paid and were not allowed to work more than sixteen consecutive hours. That is closer and more substantial than the plaintiff's connection here.[15]

As we remarked in *Shaw v. Monessen Southwestern Ry. Co.*, 200 F.2d 841, 844 (3rd Cir. 1953), we should be careful not to extend this statute too far. If a plaintiff can prove negligence he may be better off than he would be under workmen's compensation law. But if he cannot, he gets nothing. *Cf.* PA. STAT. ANN. tit. 77, § 431, § 461 (1952). The hardship of denying recovery to one who was injured

15 *Cf.* Holt v. Southern Pac. Co., 71 F. Supp. 21 (N.D. Cal. 1947), where it was held that the act did not cover a clerk filling out forms in a freight claims department.

but who cannot show the required lack of care on the part of the employer is readily apparent.

We think both from the legislative history and the course of decision that we should not extend the application of the statute to cover this case.[16]

The decision of the district court will be affirmed.

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BIGGS, *Chief Judge*, dissenting.

The plaintiff was employed in a department of the defendant Railroad where approximately 325,000 original tracings are on file. These tracings are master prints which cover "all mechanical equipment, cars, locomotives, trains, etc., and all types of structures including bridges, trackage, etc." used or maintained on the defendant's interstate system. Blueprints are made from the master prints. It was the duty of the plaintiff from time to time, to remove master prints from the files, take them to another employee who would blueprint them, and return them to the files. The blueprints would then be sent to various points.

The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also between the relative importance of em-

16 We do not see that the citation of cases on the application of the Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 201-219 (1952), is helpful. The test there is whether an employee is engaged in commerce or in the production of goods for commerce. Cases cited by appellant, *e.g.*, Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946), involve the admittedly extensive phrase, production of goods for commerce, quite a different question from what we have here. In Overstreet v. North Shore Corp., 318 U.S. 125 (1943), the Court held that, when construing the "engaged in commerce" clause under the Fair Labor Standards Act, cases interpreting its counterpart under the Federal Employers' Liability Act, before the 1939 amendment, were helpful. Contrary to appellant's suggestion, we are not required by this holding, when construing the amended Liability Act, to give weight to cases interpreting "the production of goods" phrase under the Fair Labor Standards Act.

ployees' positions as affecting transportation. Such an interpretation does not seem to be in accordance with the 1939 amendment to the Federal Employers' Liability Act, 45 USCA § 51, 53 Stat. 1404. The duties of the plaintiff, like those of everyone else employed in the same department, furthered interstate commerce. It should be noted that a disjunctive "or" follows the first semi-colon of the amendment and, if the statute be read literally, as I think it must, furtherance of interstate commerce suffices to bring an employee within the purview of the amendment: it is not necessary that that employment "directly or closely and substantially" affect interstate commerce. As was pointed out by the Superior Court of Pennsylvania, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605 (1944), the amending language "is very comprehensive, so inclusive indeed that most railroad employees come within its scope." Such a result may be unfortunate but seems to have been the intention of Congress.

I would reverse the judgment of the court below.

IN THE

# Supreme Court of the United States

October Term, 1955.

No. 621.

MARTHA C. REED,
*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,
*Respondent.*

# PETITIONER'S REPLY BRIEF.

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IN THE

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OCTOBER TERM, 1955.

No. 621.

MARTHA C. REED,

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THE PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

## PETITIONER'S REPLY BRIEF.

This Brief is submitted in reply to Respondent's Brief in opposition to Petition for Writ of Certiorari.

## ARGUMENT.

### Point I.

### Respondent's "Question Presented" Does Not Formulate the Issue at Bar.

The square issue before the Court turns on whether any part of petitioner's duties, in the language of the 1939 Amendment to the Federal Employer's Liability Act involved:

> "the furtherance of interstate commerce . . ., [or] in any way directly or closely and substantially affect such commerce. . . ."

A meaningful formulation of that issue must necessarily include the realities of the job in question. Respondent's "Question Presented" does not.

It characterizes petitioner as a "file clerk" and frames her job in terms of "the sole duty" . . . of "carry[ing] tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building".[1]

We submit that the question as presented is unanswerable because it does not comprehend the true functional nature of petitioner's job. As we urged in the Petition,[2] unless and until that true functional nature is analyzed, any attempt to apply the 1939 Amendment is an exercise upon the irrelevant material of status and job importance. It is as though a master train dispatcher (who unquestionably falls within the 1939 Amendment) were characterized thus:

> "An office worker who, in performing his duties, never left the fifth floor of an office building and did nothing more than watch colored lights on a blackboard, use the telephone and put telegrams in a box for future filing."

One looks in vain throughout Respondent's Brief for the slightest effort on its part to come to grips with the actualities of Petitioner's job.

We urged the applicabilty of a test based upon the reasoning of this Court in *Overstreet v. North Shore Corp.*, 318 U. S. 125, 63 S. Ct. 494 (1943) in the Petition:[3]

> "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?"

Respondent never addressed itself to the question or the *Overstreet* case. If it had, it would have been forced to probe to the heart of the facts in the case at bar and

1. Respondent's Brief, p. 1.
2. "Point II", p. 17, *et seq.*
3. P. 21.

necessarily to the conclusion that Petitioner's job is comprehended by the 1939 Amendment. It is that conclusion to which the majority's reasoning about the "dire chain of catastrophe" inexorably leads, but the majority arbitrarily refused to reach it.

## Point II.

## Respondent's "Statement of the Case" Is Inaccurate.

Respondent's Brief [4] states:

> "Chief Judge Biggs dissented, on the ground that, although 'such a result may be unfortunate', Congress, in adopting the 1939 Amendment, apparently intended to bring most railroad employees within the scope of the Act."

As even a cursory reading of the dissent will indicate, Chief Judge Biggs faced the problem which respondent has not, and grounded his dissent on the fact that "The duties of the plaintiff, like those of everyone else employed in the same department, furthered interstate commerce".[5] He found that such duties inevitably invoke coverage under the 1939 Amendment, as indeed they do.

That Respondent should misconceive the nub of the dissent is striking confirmation of its avoidance or misunderstanding of the real question at the core of the case.

## Point III.

## Respondent's Statement of Petitioner's Position With Respect to the Prerequisite of Coverage Under the 1939 Amendment Is Grossly Inaccurate and Misleading.

Respondent states in its brief: [6]

"Petitioner contends . . . that following the 1939 Amendment the remedy became available to any em-

4. P. 2.
5. Petition, p. 35.
6. P. 4.

ployee regardless of the nature of his work, provided only that his duties have *some eventual* effect on the interstate business of the carrier." (Emphasis supplied.)

A more distorted paraphrase of our position is not readily imaginable. At the risk of being overly repetitious, the Petition repeatedly and scrupulously hewed to the precise language of the 1939 Amendment in considering the scope of that legislation.[7]

Nothing was said or argued by Petitioner with respect to duties having "some eventual effect on the interstate business of the carrier". That is an obvious straw-man created for argumentative purposes by the Respondent.

We are indifferent to the "eventual effect" of petitioner's duties, for the 1939 Amendment is indifferent. That is not the test and it is not the question in the case. Furthermore, it is not "regardless of the nature of [the] work" but *solely because* of it that petitioner's job is comprehended by the 1939 Amendment. What is at issue, and what the respondent refuses to consider is whether the test laid down within the four corners of the 1939 Amendment applies here. We say that test does apply; that she is entitled to the full remedial effect of the legislation in which that test is embodied; and that the failure of the majority to apply it as it was meant to be applied is an error of such magnitude that the grant of certiorari is, we respectfully submit, urgently indicated.

*Respondent* strikingly points up the error of the majority of the Court of Appeals when at page 4 of its Brief it stated that the Court of Appeals rejected the "eventual effect" contention. Indeed it did, and in doing so, it too was creating and then destroying a test that we never urged is applicable. The test we did urge upon the Court of Appeals was one which the majority erroneously failed to con-

7. See "Point I" at p. 7; pp. 9, 13, 21.

sider, and yet it is one which Congress enacted in the 1939 Amendment to the FELA. On no discernible grounds other than a statutory construction which is inherently untenable[8] the majority has warped a statute and confused a vast body of decisional law which has until now developed with strikingly salutary uniformity.

## Point IV.

### Respondent's Analysis of the Scope of the 1939 Amendment Rests on Incomplete and Therefore Misleading History.

Legal history creates sound law only if it is full history. The history described by Respondent is not.

Contrary to Respondent's contention at page 9 of its Brief, the 1939 Amendment was not a petrifaction of the pre-1939 scope of coverage of the Employers' Liability Act.

The legion of back-shop cases[9] following the 1939 Amendment will not disappear no matter how strongly Respondent contends that the Amendment did nothing more than eliminate the moment of injury test and assumption of risk. Those cases must be reckoned with and identified for what they are: an orderly, consistent body of new law emerging from the expanded scope of coverage created by the 1939 Amendment.

No amount of argument will eliminate the hard fact that S. Rep. No. 661, 76th Cong., 1st Sess. 2, 3 provides, inter alia:

> "It is the aim of the bill to amend the Employers' Liability Act in three particulars:
>
> 1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate commerce."

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8. See Petition, pp. 16-17.
9. See fn. 3, Petition.

Respondent's theory of the "broadening"[10] effect is a statutory constriction unsubstantiated in law. The Court of Appeals for the Third Circuit made that clear in *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) at 799-800:

> "There is no doubt that the amendatory language broadened the coverage of the Act. It seems to have done so in *two different ways.* First, the phrase 'any part of whose duties' clearly eliminated the moment of injury test. The new phrase makes the general nature of the employee's duties the controlling factor. If 'any part' of those duties furthers interstate commerce, the employee is covered, even though at the precise moment of injury the specific mechanical task in which he was engaged was purely intrastate. Second, the amendment extended coverage to one not immediately engaged in furthering interstate commerce if his duties in any way closely and substantially affected the furtherance of interstate commerce. The amendment itself is stated disjunctively, that is, it covers an employee if any part of his duties further interstate commerce, *or* if any part of his duties in any way directly, or closely and substantially affect such commerce. If that is the sense of the Act as presently worded, we think the plaintiff here is covered by both tests." (First Emphasis added.)

The Court of Appeals for the Seventh Circuit stated in *Shelton v. Thomson*, 148 F. 2d 1 (C. A. 7, 1945) at 3:

> "There can be no doubt but that the [1939] amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce. Concededly the relationship between the encompassed occupations and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was

10. Brief, fn. 27.

this fact, no doubt, that caused Congress to enlarge the scope of the Act by stating that all employments in '*furtherance* of interstate . . . commerce' are within the Act. The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic."

Quoting selectively from the testimony of T. J. McGrath, as did the majority of the Court of Appeals [11] and the Respondent,[12] does not erase Mr. McGrath's further testimony:

"I did not draw the amendments and do not know who did. I have not given them close study and deep thought but I infer that it was probably given pretty close scrutiny by someone." [13]

## Point V.

## Respondent's Comparison With Contemporary Legislation Involving the Commerce Power Throws No Light on the Question at Bar.

We fail to see what significance in the context of this case can be drawn from Congress's failure to occupy the entire field covered by its power under the Commerce clause. Conceding *pro arguendo* that all employees of interstate carriers might be covered by appropriate federal legislation, how does Congress's failure to so act resolve the question of whether petitioner is covered by the 1939 Amendment?

The uselessness of this portion of petitioner's argument appears in its conclusion at page 20 of the Brief:

"[Congress] failed to define commerce in broader terms than transportation or to give any other indica-

11. Petition, p. 29.

12. Brief, pp. 15-16.

13. *Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess. on S. 1708, at 76 (1939).

tion that it intended to legislate to the limit of its power under the commerce clause. It thereby precluded a valid contention that it intended that employes whose duties were local in character and not connected with interstate transportation were brought within the coverage of the Act."

*But these are the questions at bar:* (1) *What is "transportation"* and (2) *were petitioner's duties "local in character and not connected with interstate transportation"?* In a real sense, to ask these questions is to show the fundamental flaw in Respondent's entire brief. It has dealt with a multitude of subjects in detail, none of which involves a frank analysis, or any analysis, of either the facts at bar or the meaning of "transportation" as against "commerce".

It is simple enough for Petitioner to claim coverage under the 1939 Amendment and for Respondent to deny it. But in the end, it is the facts of the case and not the conclusions of counsel which bear the answer and it is the meaning of "commerce" which controls the legal impact of those facts. We have met these. Respondent has not.

## Point VI.

## Respondent's Analysis of the Classes Covered by the 1939 Amendment Cannot Subsume Straub v. Reading Co., 220 F. 2d 177 (C. A. 3, 1955).

We submit that Respondent's analysis of the groups covered by the 1939 Amendment is verbalism, not precedent. It is sufficient in that connection to observe, as we have argued, the remarkable intra- and inter-circuit conflicts generated by the majority's refusal to follow its own ruling in the *Straub* case.[14] That case, with which respondent never takes issue, simply cannot be squeezed within the shrunken confines of any of the "three concentric circles" proposed

14. Petition, pp. 23-24.

by respondent,[15] If it can, then a fortiori this case must, for the instant facts are much less attenuated, coverage-wise, than *Straub*.[16]

## Point VII.

## Respondent Has Completely Ignored, Not Only the Facts at Bar, But the Opinion of the Majority of the Court of Appeals.

We have urged that the majority of the Court of Appeals committed error of such immediate and far-reaching significance that a grant of certiorari is strongly indicated. The error of the majority inheres in its judgment and the opinion which shaped that judgment.

That *opinion* merits the most careful consideration because unless rendered nugatory by a grant of certiorari, and a reversal of the judgment below, it must, for the reasons we urged, generate widespread confusion and a rash of appeals throughout our courts on the large question of the scope of the 1939 Amendment.

We have faced that opinion, analyzed it, and centered much of the argument in the petition upon it. Our argument against its error is now a matter of record, but not once in its entire argument of 21 pages has Respondent as much as touched upon it and only once[17] has it adverted to Chief Judge Biggs' dissent.

We respectfully submit that the arguments we urged on the facts at bar, the judgment and both opinions below have not been answered by the Respondent.

## Point VIII

## The Reasons for Granting the Writ Still Obtain.

Respondent's Brief has, if anything, reinforced the reasons for granting the writ.

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15. Brief, p. 14.
16. Petition, pp. 23-24.
17. pp. 10-11.

1. The *Southern Pacific Co.* cases[18] present the same large and novel question as the case at bar—the scope of the 1939 Amendment.

On page 21 of its Brief, Respondent alleges that those cases merely involve the validity of the "new construction" doctrine. Having tangentially argued the merits of those cases (incorrectly, we might add), it then claims at page 22 that those "back-shop cases were based upon *a misunderstanding of the scope of the Act*". (Emphasis supplied.) We repeat: the same question is involved and Respondent obviously agrees.

2. This decision is in conflict with *Lillie v. Thompson*, 332 U. S. 459 68 S. Ct. 140 (1947).

Respondent's comment in this respect sharply underscores the strikingly distorted view it, the majority of the Court of Appeals and *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (D. C. N. D. Cal. 1947), take of the Act. Once again the "workshirt" view appears. Lillie's function is irrelevant; all that matters to respondent is that she "worked in direct contact with trains traveling on tracks" while "petitioner in the case at bar, worked in an office building".[19] Indeed, it now appears that Respondent does not even care if Lillie's job fulfilled the interstate commerce prerequisite of the 1939 Amendment. Such blind indifference to job function and its relationship to the tests laid down in the 1939 Amendment is the logical and patently erroneous conclusion of the "workshirt" view.

3. Respondent's attempt to negate the conflict between this case and *Straub* is based on extraordinary grounds—that Straub's job occasionally "brought him" to locomotive

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18. *Southern Pacific Co. v. Gileo; Southern Pacific Company v. Moreno; Southern Pacific Company v. Aranda; Southern Pacific Company v. Eufrazia; Southern Pacific Co. v. Eelk*, certiorari granted Oct. 10, 1955, Docket No. 257.

19. Brief, p. 23

cabs (not a part of the record of the case) and he traveled from state to state.[20] The *Straub* court said at 183: ". . . but that fact has no bearing on whether his duties furthered or substantially affected interstate commerce".

Straub worked on the sixth floor of Reading Terminal Building in Philadelphia and was injured there while helping a female fellow employee remove some office forms from a high shelf above. The ladder which caused the injuries was propped against some filing cabinets at the time of the accident.

If the truncated "transportation" view and respondent's argument as to why Lillie was covered by the 1939 Amendment were applied to the *Straub* facts, Straub could not conceivably be covered by the 1939 Amendment. Certainly he did not work "in direct contact with trains traveling on tracks". He "worked in an office building". Yet he was properly held within the ambit of the 1939 Amendment because his *job function* was the one critical fact that controlled just as it should be in the case at bar.

4 and 5. There is a conflict between *Thomas v. Union Railway Co.*, 216 F. 2d 18 (C. A. 6, 1954) and the opinion of the majority of the Court of Appeals in this case. Thomas was an office worker, 1954 *Workmen's Compensation Law Reports*, ¶ 5325, yet that was no bar to his maintenance of an action under the FELA. The majority's opinion and the *Holl* case, for the reasons we argued earlier, cannot subsume office workers *qua* office workers under the 1939 Amendment.

There is also a conflict between the majority's opinion and *Erickson v. Southern Pacific Co.*, 39 Calif. 2d 324, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952). *Harris v. Missouri Pac. R.*, 158 Kan. 679, 149 P. 2d 342 (1944); *Jordan v. Baltimore and Ohio Railroad Company*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

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20. Brief, p. 23.

The *Ericksen* case squarely destroyed the "Railroader" argument which is the burden of the opinion of the majority and the Respondent, when the Court held at page 645:

> "The defendant contends that the Act does not apply to the plaintiff because he is not a 'railroader' exposed to the risks peculiar to railroading. The Act furnishes a broader definition of those eligible to its benefits. It is made applicable to any employee whose duties further interstate commerce 'or shall in any way directly or closely and substantially' affect such commerce. 45 U. S. C. A. § 51."

The *Harris* and *Jordan* cases reflect very clearly that the scope of the 1939 Amendment is much broader than the majority's interpretation or the theory advanced by the Respondent.

6 and 7. Respondent has said not a word in refutation of these important reasons for granting the writ. This Court certainly is entitled to assume that if there were an argument to be made against them, it would have been made, for, perhaps more than any of the other important reasons advanced, these reflect the vast ramifications and importance of the question at bar.

## CONCLUSION.

The test of coverage under the FELA is, and always has been, the interstate character of the employment. The Respondent's whole argument departs from that test and equates coverage with hazard. In brief, the argument is this: the purpose of the Act is to protect those whose duties bring them in close proximity to the intrinsic hazards of railroading. Hence, the engineer, the fireman, the switchmen, &c. are covered, but the "office worker" is not. Such a test, of course, disregards the basic criterion of the *interstate* (as opposed to hazardous) nature of the work. Its use runs head-on into a complete inconsistency.

Assume that a locomotive engineer, in the course of his duties, is attending an investigation in Respondent's 32nd Street Office Building and that a window breaks because of a known defective condition and injures him. If that engineer is covered,—as he undoubtedly is,—the "hazard" test is obviously totally inappropriate, because he was not injured by any intrinsic railroad hazard.

Now assume that an employee in the blue print office at 32nd Street is on one occasion directed to take a tracing directly to the foreman in charge of repairing track between 32nd Street and the Philadelphia Suburban Station. While on the tracks, the employee is negligently run over by an engine and killed. In that event the "hazard test" would compel a conclusion of coverage, but this cannot be, according to Respondent, because the employee is an "office worker", even though the instrumentality of injury was one of those very hazards intrinsic in railroading. Such examples as these could of course be multiplied many times.

It is totally illogical to argue that coverage depends on exposure to hazard, but that nevertheless protection is afforded for many injuries not the result of the hazard, and not afforded for injuries that are the result of the hazard.

For all of the foregoing reasons, we respectfully urge that the Writ of Certiorari should issue.

Respectfully submitted,

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BRIEF ON MERITS

No. 621.

IN THE

# Supreme Court of the United States

October Term, 1955.

MARTHA C. REED,

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

## BRIEF FOR THE PETITIONER.

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IN THE

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THE PENNSYLVANIA RAILROAD COMPANY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR THE PETITIONER.

### OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 227 Fed. 2d 810 (C. A. 3, 1955). This is the final judgment of the United States Court of Appeals for the Third Circuit, where judgment was entered for the respondent-defendant affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing the complaint herein. Chief Judge Biggs dissented.

## JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 17, 1955. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

## QUESTIONS PRESENTED.

1. Where the undisputed facts reveal that the duties of an office employee of an interstate railroad require her to fill orders from all the shops of its 12-state system by going among files containing 325,000 original tracings of the entire mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage of said system, locating the necessary tracings, delivering them to printmakers for duplication into working blueprints for the shops of the entire system, and thereafter replacing the said tracings in their proper places, is not the Court of Appeals, which is in conflict with this Court, itself, other Courts of Appeals, and state courts of last resort, arbitrarily and capriciously in error in holding that such employee was not within the purview of the Federal Employers' Liability Act, 45 U. S. C. Sec. 51, on grounds that her duties neither further nor directly closely and substantially affect interstate commerce?

2. Is not the Court of Appeals in error in so construing the 1939 Amendment to the Federal Employers' Liability Act, 45 U. S. C. Section 51 [Aug. 11, 1939, c. 685, 53 Stat. 1404], as to differentiate between office workers and employees engaged in actual transportation, and also between the relative importance of employees' positions as affecting transportation?

## THE STATUTE INVOLVED.

1. The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404], the pertinent portion of which reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

## STATEMENT OF THE CASE.

On July 15, 1951 while the petitioner, Martha C. Reed, was in the drafting room on the 5th floor of the respondent's 32nd Street Building in Philadelphia, Pa., one of the windows which for a long time had been cracked diagonally from top to bottom blew in upon her, causing her serious personal injuries (30a, 31a).

At the time of the aforesaid accident, the petitioner was employed by the respondent as a "print maker" at the aforesaid building (22a). Her duties consisted of filing original structural tracings of tracks, cars, engines and parts therefor (19a). The department in which the petitioner was employed had approximately 325,000 original tracings on file (20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all other types of structures including bridges and trackage (23a). The respondent's entire system is embraced within the blueprints made from the trac-

ings; that is, its entire physical plant which is found in Pennsylvania, Michigan, New York, New Jersey, Delaware, Maryland, Washington, D. C., Ohio, Indiana, Illinois and Missouri (20a). The 32nd Street Building where petitioner worked is the only place on respondent's entire system where these tracings are kept or where prints are made (14a, 20a).

Approximately 67% of the blueprints are sent by the respondent to shops in states other than Pennsylvania (20a). The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a), and the blueprints go to wherever the respondent runs (47a).

The shops in the respondent's system which are engaged in keeping the system operating send in orders (27a) for blueprints from which they conduct their operations. The petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by going from file to file (23a), locating the necessary tracings and delivering them to the print makers for duplication (28a). It is also her function and responsibility to replace in their proper places the original tracings when they have been duplicated (28a).

The complaint in this case was filed July 23, 1953 (1a). The petitioner's deposition was taken on September 10, 1953 (21a). Almost a year and a half later the respondent moved to dismiss the action on the ground that the petitioner's claim was not within the Federal Employers' Liability Act and there was no other ground for federal jurisdiction (55a, 56a). On March 17, 1955 an Order was entered by Chief Judge Kirkpatrick of the United States District Court for the Eastern District of Pennsylvania, dismissing the action with costs (59a).

On appeal to the United States Court of Appeals for the Third Circuit, judgment was entered for the respondent-defendant upon the unwarranted ground that the Fed-

eral Employers' Liability Act, 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65] as amended by the 1939 Amendment [53 Stat. 1404 (1939), 45 U. S. C. § 51 (1952)] was not broad enough to cover this case.

Chief Judge Biggs of the United States Court of Appeals for the Third Circuit dissented from the decision on grounds that petitioner-plaintiff's duties furthered interstate commerce and as such fell within the purview of the aforesaid 1939 amendment.

## SUMMARY OF ARGUMENT.

The 1939 Amendment to the Federal Employees' Liability Act, 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404] effected a coverage over employees of carriers by rail markedly broader than prior legislation. The Amendment indifferently comprehends all places of work and all ranks of personnel in a carrier's system and looks solely to the question of whether any part of a carrier employee's duties furthers interstate commerce or in any way directly or closely and substantially affects such commerce. The question of whether or not any of those relationships to interstate commerce obtain for any given employee's job can be resolved in only one manner: by an inquiry into the functional nature of that job. Neither the importance of the work nor the employee's status in the hierarchy of a carrier's system is relevant to such an inquiry. If the inquiry yields a finding that any one of the relationships to interstate commerce exists, the employee is within the ambit of the 1939 Amendment. If no such relationship is found after a functional analysis, the Amendment is inapplicable.

A functional analysis of the facts at bar leads unambiguously to the conclusion that petitioner's job duties are related to interstate commerce in every mode contemplated by the 1939 Amendment. Since the Amendment can be

invoked if any one of those relationships is found, petitioner unquestionably is an employee covered by the statute.

Notwithstanding the compelling effect of the facts at bar, the Court below held the Amendment inapplicable. The judgment below is patently erroneous, for it rests upon an arbitrary refusal to apply the Amendment as it was meant to be applied. The source of error is grounded in the Court's intrusion into the case of the irrelevancies of job status and job importance, and an unauthorized construction of the Amendment which equates "interstate commerce" with "interstate transportation" and then, in effect, transforms the latter term into the equivalent of "railroading" in its narrowest sense.

The effect of the judgment and majority decision below is not only to bar petitioner from the benefits of vital remedial legislation to which she is clearly entitled, but to confound and distort the application of the Amendment by excising from its coverage great numbers of carrier employees such as petitioner who until now have properly been held to be comprehended by the statute.

## ARGUMENT.

### Point I.

**Petitioner's Duties as Respondent's Employee Were the Furtherance of Interstate Commerce, and They Directly or Closely and Substantially Affected Such Commerce in the Authoritative Sense of Those Terms. She Is Therefore Within the Ambit of 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].**

One of the two major sources of error in the decision of the majority of the Court of Appeals is fundamentally definitional and arises from its barren answer to the crucial question of what is meant by "interstate commerce" as used in the 1939 Amendment to the Federal Employers' Liability Act.

The majority has suggested in footnote 10 of its opinion that interstate commerce under the Act is interstate "transportation" as such, thereby placing itself in direct conflict with *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 601, 34 A. 2d 221 (1943); and *Ericksen v. Southern Pacific Co.*, 234 P. 2d 279 (Cal., 1951). "Indeed", it states, "the interstate commerce involved in railroading is transportation" (at page 812) citing therefor portions of S. Rep. No. 661, 76th Cong., 1st Sess. 2, 3 (1939).[1]

We have exhausted the legislative history of the provision of the 1939 Amendment in issue in this case, and a thorough reading of it reveals how completely useless it is as an aid in resolving the issue at bar. For instance, the very document relied upon by the majority in its footnote 10 as a basis for its holding that commerce is transportation contains material, not mentioned by the majority, which negatives the inference drawn by the majority and

1. 227 F. 2d 810, 811.

supports the construction we urge. S. Rep., No. 661, 76th Cong., 1st Sess. 2, 3 provides, *inter alia:*

> "It is the aim of the bill to amend the Employers' Liability Act in three particulars:
>
> "1. It broadens and clarifies the law in its application to *employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.*" (Emphasis supplied.)

So too the majority below, and respondent here, in drawing their conclusion about the scope of the Amendment, quote from and obviously rely heavily upon certain testimony which Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, gave before the Sub-Committee of the Senate Committee considering the then proposed Amendment.

We are at a total loss to understand why any reliance is to be placed on Mr. McGrath's testimony. First, remarks by those not responsible for the preparation of legislation are not treated as significant expressions of legislative intent: *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 125 (1942); *United States v. United Mine Workers*, 330 U. S. 258, 276-277 (1947); *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493-494 (1931) and cases cited. Secondly, Mr. McGrath was, in essence, a "special pleader", obviously concerned only with the effect of the Amendment on members of his Brotherhood, and not the effect of the Amendment as a whole. And finally, there is Mr. McGrath's own testimony (unquoted by the majority or respondent) at the same hearings that:

> "I did not draw the amendments and do not know who did. I have not given them close study and deep thought but I infer that it was probably given pretty close scrutiny by someone."[2]

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2. *Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess. on S. 1708, at 76 (1939). This is, of course, the same document cited in the majority opinion's footnote 8.

The quotation from Mr. McGrath's testimony by the majority lends absolutely nothing in answering the question at the very heart of this case: How much did the 1939 Amendment enlarge the coverage of the Act? The answer must lie in areas more authoritative than this kind of completely inconclusive legislative history.

Assuming *pro arguendo* that transportation is the commerce contemplated by Congress in the enactment of the 1939 Amendment, was any part of petitioner's duties, in the language of the Amendment "the furtherance of interstate or foreign commerce (read: transportation); or . . . [did any part] in any way directly or closely and substantially affect such commerce" (read: transportation)?

Having said that the contemplated commerce is transportation, the majority of the Court of Appeals then leaves the matter there. But this, of course, is fruitless tautology since the substitution of one term for another merely begs the question: What is transportation? One looks in vain for the Court's express answer to the question so squarely raised by the substitution of terms.

In all candor, we must ask: is there a difference in the meaning of these terms interstate commerce and transportation?

We urge that a difference there is. It is substantial and the cases in which the terms have been used underscore that difference. In essence it is one of the breadth of concept of the scope of the 1939 Amendment. If the cases are read with a view toward this differentiation it becomes apparent that there are two conflicting views of the effect of the 1939 Amendment.

One view is symbolized by the term "interstate transportation" which has really been used by the majority of the Court of Appeals as a designation of the employee's physical proximity to the classical stuff of railroading: throbbing pistons, the hiss of air in a brake assembly, rattling couplers and rolling stock on flashing rails. Were this view articulated, it would state that to be engaged in

interstate transportation is to be physically near and quite directly in actual contact with the materiel which makes the haul.

If the majority's opinion is read with such a premise in mind, it is very clear that the opinion evolves in a manner totally consistent with that premise. Note, for instance, that "transportation" replaces "commerce" and is then left undefined. What is the purpose of substituting terms if it does not advance the meaning of either of them? But observe that "transportation" has much more the flavor of railroading than "commerce".

In the same mood, the majority raises and then disposes of various examples of employees—the copy writer; printer; typist in the President's office or the clerk who makes out the checks—by stating "Yet all this is a far cry from transportation itself" (at page 811). Is it? How can that be said until the meaning of "transportation" is known? However, a definition is never expressly laid down by the majority. Nonetheless, that parade of carrier personnel could be summarily excluded without difficulty or hesitation from Federal Employers' Liability Act coverage if this truncated view of the 1939 Amendment were adopted. Obviously that has been done. Note that the majority views with alarm the dictionary application of the word "furtherance" for it would "sweep all employees of interstate railroads into the group covered by the statute" (at page 811). Its concern for this result is generated by the set of symbols of the aforementioned group of workers not a single one of whom is begrimed with railroad soot.

The clinching justification for urging this as the majority's unstated premise is its remarkable reversal of the holding of the same Court in *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955) a detailed comparative analysis of which appears *infra* under Point II. As we shall indicate the *Straub* case, which also involved a white-collar worker, presented a set of facts considerably more attenu-

ated than those at bar, yet they properly yielded Federal Employers' Liability Act coverage while the present facts are held not to. In its withdrawal from the correct holding of the *Straub* case and the authorities grounding that decision, the majority has created a dissonance which simply cannot be harmonized by asserting that these are *ad hoc* adjudications. In fact, the present decision represents a major shift in the Third Circuit's theory of the scope of the 1939 Amendment.

This view of the 1939 Amendment simply has no foundation. The disposition apparently rests on nothing but *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (D. C. N. D. Cal. 1947) which is at least subject to the fair observation that it is factually unrelated to this case except that both plaintiffs are office workers. As we indicate in Point II, that fact alone should be immaterial.

Furthermore, the unstated premise which permeates the majority's opinion runs throughout the *Holl* opinion: a view that the 1939 Amendment simply could not encompass the white-collar worker. Note, for instance, the language at page 23 of the *Holl* case:

> "If [plaintiff] comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. *And so, for that matter, does every other clerical employee in the department.* I do not think that it was the intention of the Congress to include *such employees* and to withdraw them from the protection of State Employer's Liability Laws." (Emphasis supplied.)

A fair paraphrase of this language is that a clerical employee, *as such*, cannot fall within the 1939 Amendment, for the Court simply excludes "such employees" without so much as qualifying its blanket conclusion with the real contingency that others of "such employees" may have

duties fulfilling either of the disjunctive clauses of the 1939 Amendment. But this contingency simply cannot exist if the "transportation" view of commerce is applied. Indeed, that Court, as the majority here, never has to go into the question of the true nature of the employee's duties.

The *Holl* Court continues at page 23:

> "On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in such commerce.'* This would have extended the Act to 'any person suffering injury while he is employed by such carrier', and would have placed *all employees of interstate railroads under the Act*, **whether their work be clerical or not,** or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier.* (Boldface emphasis supplied.)

The boldface emphasis: "whether their work be clerical or not" is, we respectfully submit, a complete confirmation that it is the "workshirt" view of the 1939 Amendment to which the *Holl* Court subscribes. It is clerical work *qua* clerical work which that Court simply cannot subsume in its theory of the Act.

As if this were not proof enough of that Court's unstated premise, observe its catalogue of cases at page 24 of the opinion as to which the Court states at page 24:

> "It is quite evident that each of the employees just mentioned, whether *switchman, brakeman, trackman, repairman, or oilman,* was performing a function connected directly with, or which affected, interstate commerce. Each was doing something in furtherance of interstate commerce, whether he was assisting in the preparation or preservation of *rolling stock, equipment, roadbeds, instrumentalities, accessories or materials* used for repairs. And each was furthering, i.e.,

*promoting* or helping along, present or future interstate commerce. (First two emphases supplied.)

Without exception, these examples have the full flavor of railroading in the literal, constricted sense of the term.

Note finally the Court's emphasis on the word "promoting" as a synonym for "furthering". This was one of the words (i.e., "promotion") from which the majority of the Court of Appeals fled because it felt that an application of a dictionary term such as this "will sweep all employees of interstate railroads into the group covered by the statute" (at page 811).

We submit that the same erroneous unstated premise which runs through the majority opinion infects the *Holl* opinion as well. Together, these cases conflict markedly with the remedial intent of the 1939 Amendment and indeed with respect to the word "promotion" they are at war with each other.

The gist of the matter is that the "railroader" theory of the 1939 Amendment is wrong. *Ericksen v. Southern Pacific Co.*, 39 Calif. 2d 374, 246 P. 2d 642 (1952), cert. denied 344 U. S. 897 (1952), squarely destroyed it when that Court held at page 645:

> "The defendant contends that the Act does not apply to the plaintiff because he is not a 'railroader' exposed to the risks peculiar to railroading. The Act furnishes a broader definition of those eligible to its benefits. It is made applicable to any employee whose duties further interstate commerce 'or shall in any way directly or closely and substantially' affect such commerce. 45 U. S. C. A. § 51."

The holdings in *Straub v. Reading Co., supra,* and *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947) show without doubt that a white collar is no bar to Federal Employers' Liability Act coverage. See also *Bowers v. Wabash Railroad*, 246 S. W. 2d 535 (Mo. App. 1952) and

*Thomas v. Union Railway Co.*, 216 F. 2d 18 (C.A. 6, 1954), 1954 *Workmen's Compensation Law Reports* ¶ 5325. All of these cases were cited in the appeal below, but appear to have had no effect in preventing the majority from indulging this pinched theory of the 1939 Amendment.

In sharp contradistinction to the "interstate transportation" concept is the great weight of authority hewing to the "interstate commerce" theory the essence of which is that coverage under the 1939 Amendment is circumscribed not by a ribbon of rails, but by that totality of carrier employees' work processes which result in the interstate movement of men and goods on those rails.

Unlike the majority's view of the 1939 Amendment, the concept finds nothing inherently difficult about covering the white-collar job under the Amendment since it is not physical proximity to a roadbed but the nature of the work process which sets the limits of coverage. Thus, under this theory of the Act, it is perfectly conceivable and indeed the Act contemplates that a "clerical" worker can have duties which, in the language of the 1939 Amendment, "shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce."

If, as we submit, these are significantly dissimilar and conflicting theories of the scope of the 1939 Amendment, then it is of great importance both to the Third Circuit and courts throughout the nation to determine from more authoritative sources than those suggested by the majority which of these conflicting views is justified by the intent of Congress in its enactment of the 1939 Amendment. (And, of course, so long as the differences are exposed, it ultimately matters not how the views are labeled: commerce equals transportation or commerce equals commerce.)

We respectfully urge that the latter full view of the 1939 Amendment is the only one consonant with Congressional intent. It is now long-settled law that the 1939 Amendment was a great broadening of the FELA, eliminat-

ing as it did the old "moment of injury" test and the "intimate and integral part" of interstate transportation view of the Act. *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 591, 34 A. 2d 221 (1943); *Southern Pacific Co. v. Industrial Accident Commission*, 19 Cal. 2d 271, 120 P. 2d 880 (1942). The backshop cases[3] can only be explained by this expanded ambit of the statute.

It is now beyond question that the 1939 Amendment effected a marked enlargement of coverage under the FELA. The Court of Appeals for the Third Circuit acknowledged this in *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) at 799-800:

> "There is no doubt that the amendatory language broadened the coverage of the Act. It seems to have done so in *two different ways*. First, the phrase 'any part of whose duties' clearly eliminated the moment of injury test. The new phrase makes the general nature of the employee's duties the controlling factor. If 'any

3. Harris v. Missouri Pac. R. Co., 158 Kan. 679, 149 P. 2d 342 (1944); Trucco v. Erie R. Co., 353 Pa. 320, 45 A. 2d 20 (1946); Jordan v. Baltimore and Ohio Railroad Company, 62 S. E. 2d 806 (1950); Baltimore and Ohio Railroad Company v. Rodeheaver, 81 A. 2d 63 (1951); McGuigan v. S. Pac., 247 P. 2d 415 (1952); Baird, et al. v. New York Central R. R., 86 N. E. 2d 567 (N. Y. 1949); Wills v. Terminal R. R. Ass'n. of St. Louis, 239 Mo. App. 1144, 205 S. E. 2d 942 (St. Louis Court of Appeals, 1947); Pauley v. McCarthy, 166 P. 2d 501 (Utah, 1946); Murphy v. Boston and Maine R. R., 65 N. E. 2d 923 (Illinois, 1946); Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062 (1943); Ermin v. P. R. R., 36 F. Supp. 936, 940 (D. C. E. D. N. Y., 1941); Ernhart v. Elgin J. & E. Ry. Co., 84 N. E. 2d 868, 337 Ill. App. 56 (Ill., 1949); affirmed 92 N. E. 2d 96, 405 Ill. 577; Prader v. P. R. R., 49 N. E. 2d 387 (Ind., 1943); Rainwater v. Chicago, R. I. & P. Ry. Co., 21 So. 2d 872 (La., 1945); Agostino v. P. R. R., 50 F. Supp. 726 (D. C. E. D. N. Y., 1943); Albright v. P. R. R., 37 A. 2d 870 (Md., 1944), cert. den. 323 U. S. 735, 65 S. Ct. 72; Desper v. Starved Rock Ferry Co., 342 U. S. 187, 72 S. Ct. 216 (Ill., 1952); Scarborough v. P. R. R., 154 Pa. Super. 129 (1943); Wright v. New York Central Railroad Co., 33 N. Y. Supp. 2d 531 (N. Y., 1942); Edwards v. Baltimore & Ohio Railroad Co., 131 F. 2d 366 (C. C. A. 7, 1942); Cheffey v. P. R. R., 79 F. Supp. 252 (D. C. E. D. Pa., 1948).

part' of those duties furthers interstate commerce, the employee is covered, even though at the precise moment of injury the specific mechanical task in which he was engaged was purely intrastate. Second, the amendment extended coverage to one not immediately engaged in furthering interstate commerce if his duties in any way closely and substantially affected the furtherance of interstate commerce. The amendment itself is stated disjunctively, that is, it covers an employee if any part of his duties further interstate commerce, *or* if any part of his duties in any way directly, or closely and substantially affect such commerce. If that is the sense of the Act as presently worded, we think the plaintiff here is covered by both tests." (First Emphasis added.)

The Court of Appeals for the Seventh Circuit also recognized the expansion of coverage in *Shelton v. Thomson*, 148 F. 2d 1 (C. A. 7, 1945) at 3:

"There can be no doubt but that the [1939] amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce. Concededly the relationship between the encompassed occupations and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was this fact, no doubt, that caused Congress to enlarge the scope of the Act by stating that all employments in '*furtherance* of interstate . . . commerce' are within the Act. The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic."

Thus the constriction of coverage effected by the majority of the Court of Appeals in the case at bar is an unauthorized surgery upon the 1939 Amendment which, if permitted to go uncorrected by this Court, will leave a misshapen statute which Congress never intended.

The unwarranted excision appears very clearly in the majority's opinion. It notes, initially, that "the two clauses [in the 1939 Amendment] are in the disjunctive" (at page 811). Many FELA cases, exemplified by *Robinson v. Pennsylvania R. Co., supra,* substantiate that construction.

But the majority thereafter refuses to reason to the conclusion to which those disjunctive phrases lead. Having observed the dictionary definitions of the word "furtherance", the majority will not apply them accordingly for fear "that a literal dictionary application of the word will sweep all employees of interstate railroads into the group covered by the statute" (at page 811). Is there something amiss with such an effect in the light of Chief Judge Biggs' accurately dissenting observation at page 814:

> "As was pointed out by the Superior Court of Pennsylvania, *Scarborough v. Pennsylvania R. Co.*, 1944, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605, the amending language 'is very comprehensive, so inclusive indeed that most railroad employees come within its scope'. Such a result may be unfortunate but seems to have been the intention of Congress."

Beyond this, the former Acting Solicitor General of the United States, Robert L. Stern, Esq., observes in his 1955 Ross Prize Essay, "The Scope of the Phrase Interstate Commerce", 41 A. B. A. L. J. 823, 873 (Sept. 1955):

> "Use of the phrase 'interstate commerce' [in certain other statutes], however, affords no basis for changing the meaning of the constitutional expression. Since such statutes do not exhaust Congress' constitutional authority, Congress has ample power to expand or contract statutory coverage by amendment, without redefining the constitutional phrase. That was what happened to the Federal Employers' Liability Act, which originally applied only to injuries to employees en-

gaged in interstate commerce [citation]. The over-refinements [citation] which resulted from judicial interpretation of that phrase [citation] led to the replacement of the 'in commerce' test by language which covered *all* railroad employees [citation]." (Emphasis supplied.)

Having refused to apply the "furtherance" clause as it was intended, the majority holds that " 'furtherance' was meant to cover those in the actual business of transportation itself and the second clause was to cover the fringes" (at page 812).

We have identified the "transportation" theory for what it really is and find no sound basis either for that view of the scope of the Amendment or the majority's construction that the second clause was the broader of the two because it "was to cover the fringes", for as Chief Judge Biggs properly notes in effect in his dissent, the disjunctives are alternative modes of qualifying for coverage. There is no authoritative reason for holding that one clause is broader than the other.

The majority's reading not only runs afoul of settled authorities, but is grossly inadequate on its own terms. Even if we assume *pro arguendo* that that construction of "commerce" is justified, immediate and fatal difficulties arise. It must follow that if "the actual business of transportation" itself were the limitation of the first clause that the majority says it is, then the "fringes" meant to be covered by the second clause, touch or involve something in addition to, beyond, or other than such transportation. What is it? By what legal standards are injured carrier employee's rights now to be determined under this view of the 1939 Amendment?

If something other than or beyond "the actual business of transportation" is comprehended by the second clause, to what do that clause's words "in any way . . . affect such commerce" refer? Grammatically, what is "such

commerce" if not the alleged "actual business of transportation"?. And yet, logically, this cannot be for the majority has said that the phrase from which it comes is broader than the referent first disjunctive phrase "such commerce".

We earnestly submit that grammatically, logically and historically the interpretation is embarrassing and patently impossible. If it is allowed to stand, it must breed widespread confusion, uncertainty and unnecessary litigation and appeals. The disorder will hobble a set of, until now, clear and effective remedies for the class intended to be covered by the remedial legislation of the 1939 Amendment.

## Point II.

**A Carrier Employee's Job Function, and Not the Relative Importance of His Work or Status, Is the Sole Determinant of Coverage Under 45 U. S. C. Section 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].**

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(A) The Importance of a Carrier Employee's Job or Its Status in the Hierarchy of the Carrier's System Are Irrelevant.

As indicated *supra*, the opinion of the majority of the Court of Appeals places an erroneous construction upon 45 U. S. C. Section 51. An accurate construction renders the effective coverage of the 1939 Amendment much broader than the majority was willing to recognize thus insuring that carrier employees shall have available to them the remedies Congress intended they have.

As we have argued, the error of the majority arises from unwarranted statutory construction. The other source of error is in an area where two distinct and unrelated sets of inferences can be drawn from the same set of facts in a case such as this; *inferences of job status and inferences of job function.*

The large and legally irrelevant inference used both by the respondent and the majority in the opinion of the Court of Appeals is that petitioner's job is a relatively unimportant one in the hierarchy of railroad affairs, and the majority of Court seems further concerned by the fact that petitioner is an office worker (see its analogizing examples covering only office workers). These are inferences of status and importance and have with utterly no justification been made one of the legal bases for excluding petitioner from the coverage of the 1939 Amendment to the F. E. L. A.

The ensnaring effect of this exercise upon such irrelevancies can readily be seen in an example such as that of an interstate carrier's master train dispatcher who unquestionably falls within the 1939 Amendment. Yet this is how that job would be characterized if the majority's rationale were applied to it:

> "An office worker who, in performing his duties, never leaves the fifth floor of an office building and does nothing more than watch colored lights on a blackboard, use the telephone and put telegrams in a box for future filing."

In his dissent from the Court of Appeals' decision, Chief Judge Biggs fixed upon the error of such reasoning when he stated at page 814:

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also *between the relative importance of employees' positions as affecting transportation.*" (Emphasis supplied.)

In its discussion of the facts of this case, the majority of the Court of Appeals excludes petitioner from coverage under the 1939 Amendment by linking her status with that of "a messenger boy" at the end of a "dire chain of catastrophe" and remarking "One is reminded of the old

rhyme 'for want of a nail the shoe was lost'" (at page 813).

It is petitioner's position that indeed such a chain is involved here as in all such FELA cases, and it is to this that a Court must look in testing for applicability of the 1939 Amendment. But the majority, having been correctly reminded of the adage, summarily abandoned it and proceeded to the bald assertion, resting on no explicitly reasoned grounds whatsoever, that this case is not covered by the Act.

The "chain of catastrophe" in the old rhyme is a chain of functional relationships, and not some Dantean chain of status in which the petitioner-file clerk is placed one position above the messenger boy. The moral of the story is that the battle was lost not because a *private* set off the chain of catastrophe but because the *want of a nail* did. Of what analytical value is the analogy to this case unless it be to the question of the functional relationship of petitioner to interstate commerce? And if that is its intellectual purpose, the fact that the majority of the Court of Appeals abandoned the analysis at the very moment it so productively suggested it is a further indication that a functional analysis was never applied to the facts at bar.

It is our position that the only valid inference to which an inquiry on such facts should be directed is one of *function*. Once the analogy suggested by the majority is posed, there arises the question of petitioner's duties and its answer points clearly to a conclusion of coverage under the Act.

We may designate petitioner a mere file clerk, messenger or by any other job classification. But what in truth are her *duties?* She is indeed engaged in important work which is rendered no less important by the somewhat drab title her job carries. Importance aside (as it should be) the critical fact is that her duties are related to interstate commerce in all those respects comprehended by 45 U. S. C., Section 51.

Petitioner was employed in a department in which approximately 325,000 original tracings were on file (20a). This was the only office in which original tracings were filed (14a, 20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage (23a). This was the only place in respondent's system in which the blueprints were made (14a, 20a). Respondent's entire system is embraced within the blueprints made from the tracings. The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a). Blueprints go to wherever respondent runs (47a). It runs through at least twelve states (20a). Approximately 67% of the prints are sent beyond Pennsylvania's state line (20a).

It is clear that the master sheets and the blueprints made from them have a direct connection with, and effect upon, interstate commerce. The railroad's interstate system almost literally runs on those documents. From them the respondent's physical plant has been built. Its tracks, bridges and rolling stock are their end product and unquestionably are kept in operation through their continual use in the construction of new equipment and the repair and replacement of worn and broken gear, equipment, cars, locomotives, trackage, depots, power houses and the like. Without them the respondent could never have gone in operation as an interstate carrier and it could not long continue in the stream of interstate commerce were they destroyed or rendered useless or not subject to constant reference for maintenance and repair.

It is in this context that the petitioner, a "file clerk", works. And what precisely is her function? The shops in respondent's system, which are engaged in keeping the system operating, send in orders (27a) for blue prints from which they conduct their operations. Petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by running around from file to file

(23a) locating the necessary tracings and delivering them to the printmakers for duplication (28a). It is also her function to replace the original tracings when they have been duplicated (28a).

Thus, it appears that until the tracings are taken out of the dead storage of a file cabinet by someone who knows their location and can get them when they are needed, the tracings are of no use to anyone. It should also be apparent that unless they are accurately replaced in their proper niches, confusion, delay and worse may result when they are needed again by the railroad's shops. Without the tracings the new prints cannot be made. Without the prints new or extra parts cannot be made. Old ones cannot properly be repaired. The system would grind to a halt, a conclusion in no wise vitiated by the majority's characterization of such a cessation as "dismal" (at page 813).

When seen in this perspective, petitioner's title of "file clerk" tells little if any of the full story of her actual role. The work she does is necessary, vital and important. But these qualities, of themselves, do not necessarily bring her within the ambit of the Federal Employers' Liability Act. We must look to see whether these duties, or any part thereof, "shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially affect such commerce . . ." as the Act requires.

It is our position based upon the reasoning of this Court in *Overstreet v. North Shore Corporation*, 318 U. S. 125, 63 S. Ct. 494 (1943) that a simple, direct and workable test to determine whether these elements are met here lies in the question: "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?" This is but the other side of the 1939 Amendment to the Federal Employers' Liability Act. Eliminate petitioner's function and the answer must be in the affirmative. It does not matter what we call her job. By any title, or no title,

were that function eliminated or improperly performed, the vital tracings would not then get up and walk out of the file drawers in which they repose. And so long as they remain there, the prints duplicated from them would never get to the shops which keep the system operating in interstate commerce. Someone must perform this function, else there would unquestionably be an impediment and delay to the furtherance of interstate commerce and an impediment directly, closely and substantially affecting the furtherance of such commerce. Just as the hostler takes the locomotive from the roundhouse to the running tracks, so petitioner takes the tracings from the files to the maintenance, repair and construction shops and jobs. Hers is a necessary step. She is a necessary cog.

There can be no doubt that a riveter who drills a hole in an engine is covered. The man who carries the rivet is also certainly covered. Can it possibly matter whether he carries a rivet, a blueprint or a tracing? The important thing is that each is performing a function necessary to interstate commerce. Petitioner here was performing work just as necessary to interstate commerce as the man who carrfes the blueprint for the riveter and is, therefore, just as he, covered by the Act.

Note, too, that under this test there can be put to rest the traditional concern of where to draw the Federal Employers' Liability Act coverage line. As indicated, *function* and not the misleading labels of job *status* or *title* should control. It can thus be seen that under this test there *are* railroad employees who would not receive Federal Employers' Liability Act coverage. An office worker, as such, (but another label) may or may not be covered. More must be known of the precise function. Petitioner here is an office worker who, we submit, is clearly within the ambit of the Federal Employers' Liability Act.

A functional analysis of petitioner's duties leads to a most striking conclusion: the truth of the matter is that her job furthers interstate commerce *and* it directly, closely

and substantially affects it. The duties of her job meet *every* test laid down in the 1939 Amendment even though coverage can be invoked if *any one* of the disjunctive provisions is fulfilled.

Once the befogging atmosphere of job status and relative importance is dissipated and the facts are faced this conclusion becomes so self-evident that a contrary position such as that taken by the majority seems inexplicable. It is.

Notwithstanding this argument and the analysis upon which it is based, the majority of the Court of Appeals has stated at page 813:

> "We think it just as well if we do not try to lay down a litmus test which will give a red or blue reaction to all possible sets of fact."

No such test was sought of that Court. Petitioner is well aware that the scope of the 1939 Amendment is not a matter of logarithmic certainty. However, to say this is not to concede what in effect has been laid down by the majority of the Court of Appeals as the basis for adjudication: a necessarily arbitrary *ad hoc* disposition resting on no discernible reasoning except a desire to shrink the limits of 1939 Amendment previously and properly authorized by the very same Court of Appeals, and virtually every other court in the country.

An examination of the majority's opinion reveals this is not an overstatement of the case. The gist of its adjudication on the facts at bar and the precise point at which it generated intra- and inter-circuit conflicts is found at page 813 where the Court said:

> "We think here that we are being asked to apply the act in a situation which would take us further than any case we have seen. We said in *Straub v. Reading Co.*, 3 Cir. 220 F. 2d 177, 183, that we had a 'borderline' case in a matter which involved an assistant chief timekeeper whose responsibility was to see that employees

were properly paid and were not allowed to work more than sixteen consecutive hours. That is closer and more substantial than the plaintiff's connection here."

If we assume the broad and accurate view of the 1939 Amendment, this quoted portion of the opinion is remarkable, for the facts of the *Straub* case actually extend much closer to the limits of the 1939 Amendment than those of the case at bar. If the construction of the 1939 Amendment previously proposed by the majority is assumed, then the *Straub* case is utterly inexplicable. From the present facts, much less attenuated coverage-wise than *Straub*, the same Court has drawn an opposite conclusion stating simply "That is closer and more substantial than the plaintiff's connection here." Why? Surely the mere statement does not make it so.

Straub worked on the sixth floor of the Reading Terminal Building in Philadelphia and was injured there while helping a female employee remove office forms from a high shelf. The ladder which caused the injuries was propped against some filing cabinets at the time of the accident. Although his job took him to several states, the *Straub* court properly held at 183 ". . . but that fact has no bearing on whether his duties furthered or substantially affected interstate commerce."

It is certain that upon an analysis such as that laid down in *Overstreet v. North Shore Corp., supra*, there should be no question that without Straub's functions, the net impact upon interstate commerce would be reflected much more slowly and indirectly than the withdrawal or confusion of petitioner's duties. Straub's duties as assistant timekeeper were "to prevent payroll padding and to ensure appellant's compliance with the Federal Hours of Service Law" (at page 183). Without the execution of such duties, it is perfectly conceivable that there might be no directly appreciable effect on interstate commerce. That is, employees overseen by Straub might neither pad the

payrolls nor work more than sixteen consecutive hours, and even if there were padding and overwork there would still remain the question of what the proximate net effect upon interstate commerce would be. In saying this, we are in no sense questioning the correctness of the *Straub* decision which we respectfully submit was properly decided for reasons we urged upon the Court of Appeals in the argument of that case.

But on the facts at bar, the tracings would not get out of these files unless they were taken therefrom nor would they return unless placed therein. They would not position themselves properly. In a real sense, Straub's duties might be executed by those of his overseen employees who had neither the desire to pad payrolls nor work beyond the designated time. But here no such execution of petitioner's duties by others is possible. Either she prosecutes them or her work does not get done. And if that work is not done the effect is felt directly, immediately and effectively all through the stream of interstate commerce.

What then can be the rationale for the majority's conclusion that Straub's duties are "closer and more substantial than the plaintiff's connection here?" The explanation must lie in Chief Judge Biggs' cogent observation at page 814 that:

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also between the relative importance of employees' positions as affecting transportation."

For the reasons stated both in Point I, *supra*, and the discussion herein, neither of these differentiations is justified under the statute. The decision of the majority of the Court of Appeals is a completely erroneous and arbitrary adjudication upon the facts at bar, and is a clearly unauthorized disfigurement of the 1939 Amendment. If not

corrected by this Court it can only confound the application of a statute whose integrity demands decisional uniformity and broad, undiminished scope.

The opinion of the majority represents the latest and most significant attempt to shrink the coverage of the FELA. It thereby strips countless numbers of interstate carrier employees of rights which Congress meant to be secured by the enactment of the 1939 Amendment to the FELA. Until the emasculating decisions of the Court of Appeals and the *Holl* court had been rendered, it was thought that the "transportation" argument had been permanently discredited by cases such as *McFadden v. Pennsylvania R. Co., supra*, and the many backshop cases following it.

Subsequent attempts to chop away at the FELA came in the form of a challenge that the repair was not being made *directly* to an artery of interstate commerce. *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) stopped that attempt to impair the effect of the FELA. There followed another effort to narrow the scope of the FELA through the argument that only persons engaged in physical labor were protected by the Act. This, too, failed, *Straub v. Reading Company, supra.*

Once again, the threat of unauthorized statutory surgery is posed by the decision of the Court of Appeals.

With the cases of *Southern Pacific v. Gilco, et al.*, (Docket No. 257) now awaiting argument before this Court, there has finally been raised in this forum the question of the scope of the 1939 Amendment. The facts of those cases embrace backshop workers. The other large area ripe for the consideration of this Court is symbolized by petitioner's job as an office worker. We respectfully submit that like the backshop worker, the office worker such as petitioner is within the coverage of the FELA, for the proper test should indifferently comprehend all places of work in a carrier's system, and all ranks of personnel. It

should look solely to the true nature of the employee's job function.

By granting certiorari in the *Southern Pacific* cases and this case the Court now has before it a full set of cases and comprehensive facts from which the much-needed authoritative construction of the scope of the 1939 Amendment can be roundly drawn. We urge, for all the reasons discussed, that the construction must look to job function and to job function alone in determining whether the statutorily defined relationships to interstate commerce are present.

Such a standard will erase the palpable error of the decision of the United States Court of Appeals in this case, correct confusion both within and without that Circuit and avoid it in future rulings in this vast and important field of law. Not to reverse here will mean an avalanche of cases litigated as to coverage which will crowd our courts with all the uncertainties of the nightmarish pre-1939 days. See the host of pre-1939 cases annotated at 45 U. S. C. A. § 51 [1954 ed.], notes 263, 1116, 1117, 1118.

### (B) The Sole Test Is the Relationship Between Job Function and Interstate Commerce.

The test of coverage under the FELA is, and always has been, the interstate character of the employment. The "railroader" theory denies that test and equates coverage with hazard. In brief, the argument is this: the purpose of the Act is to protect those whose duties bring them in close proximity to the intrinsic hazards of railroading. Hence, the engineer, the fireman, the switchman, &c. are covered, but the "office worker" is not. Such a test, of course, disregards the basic criterion of the *interstate* (as opposed to hazardous) nature of the work. Its use runs head-on into a complete inconsistency.

Assume that a locomotive engineer, in the course of his duties, is attending an investigation in respondent's 32nd Street Office Building and that a window breaks because of a known defective condition and injures him. If that engineer is covered,—as he undoubtedly is,—the "hazard" test is obviously totally inappropriate, because he was not injured by any intrinsic railroad hazard.

Now assume that an employee in the blue print office at 32nd Street is on one occasion, directed to take a tracing directly to the foreman in charge of repairing track between 32nd Street and the Philadelphia Suburban Station. While on the tracks, the employee is negligently run over by an engine and killed. In that event the "hazard test" would compel a conclusion of coverage, but this could not be if the majority's view were followed, because the employee is an "office worker", even though the instrumentality of injury was one of those very hazards intrinsic in railroading. Such examples as these could of course be multiplied many times.

It is totally illogical to argue that coverage depends on exposure to hazard, but that nevertheless protection is afforded for many injuries not the result of the hazard, and not afforded for injuries that are the result of the hazard.

## CONCLUSION.

Petitioner's duties fell squarely within the scope of the 1939 Amendment to 45 U. S. C., Section 51 in the authoritative sense in which the Amendment has been construed and applied. By affirming the judgment of the District Court dismissing the complaint herein, the Court of Appeals has thus committed serious error which, if uncorrected by this Court; will deprive the petitioner of rights vouchsafed by a solemn act of Congress, ramify into a grave distortion and confusion in the interpretation and application of the FELA in courts across the entire nation, and deprive countless other employees of interstate carriers of the benefits of this remedial legislation.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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*Counsel for Petitioner.*

IN THE

# Supreme Court of the United States

October Term, 1955.

No. 621.

MARTHA C. REED,

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

# PETITIONER'S REPLY BRIEF.

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## INDEX.

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## MISCELLANEOUS.

## PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's Brief in opposition to petitioner's Brief on Merits.

## ARGUMENT.

### Point I.

### Respondent's "Question Presented" Again Fails to Formulate the Issue at Bar.

We contended in certiorari proceedings and we continue to urge that the question at bar is one which turns on whether any part of petitioner's duties, in the language of the 1939 Amendment to the Federal Employers' Liability Act [1] involved:

> ". . . the furtherance of interestate . . . commerce . . ., or . . . in any way directly or closely and substantially, affect such commerce . . ."

The respondent persists in framing the question presented to the Court in terms that simply do not comprehend the realities of the job in question. Its "Question Presented" characterizes petitioner as a "file clerk" and frames her job in terms of the sole duty of ". . . carry[ing] tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building!" [2]

We submit that the question as presented by the respondent is unanswerable because it does not comprehend the true functional nature of petitioner's job as we urged in our Brief on the Merits.[3]

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1. Act of August 11, 1939 c. 685, 53 Stat. 1404, 45 U. S. C. § 51.
2. Respondent's Brief, "Question Presented".
3. Petitioner's Brief, "Point II", p. 19 *et seq.*

Unless and until that true functional nature is analyzed, any attempt to apply the 1939 Amendment is an exercise upon the irrelevant material of status and job importance.

This is a position we have consistently maintained and we reiterate it here. Once more we have diligently searched respondent's argument in its Brief and have failed to find so much as one allusion to the actualities of petitioner's job. Rather than meet the facts at bar by discussing them in the context of the straightforward language of the 1939 Amendment, respondent has instead presented a rampant conceptualistic theory of the Amendment which, if accepted, will fasten upon the bench and bar the aimless obligation of henceforward searching for unreal categories in which to pigeonhole the real facts of every future FELA action.

The language of the 1939 Amendment will literally become irrelevant in testing for coverage under the Amendment. The sole question will be: does the label pinned on the job of a plaintiff in an FELA action conform to any of the job labels which respondent claims are an exhaustive catalogue of covered employees? If it does not, the Act will not apply notwithstanding the fact that the functional details of that job will establish any or all of the relationships to interstate commerce which, until now, have been held to be the prerequisite of coverage under that statute.

Substance will be put aside for form and FELA actions will become contests over job titles. Today the slogan "file clerk" is being used to take from a railroad employee the remedies of the FELA to which, as we have argued, she is entitled. Tomorrow the incantation of another catchword will further deplete this legislation of its vitality. Henceforward, a court faced with a contest over jurisdiction of the subject matter in a suit under the 1939 Amendment would perform its adjudicating function by mechanical classification without reference to the language of that Amendment or functional realities. Its task would be complete when it had decided whether or not any *job title* fitted those employee types which, we are told, are exhaustive.

On the basis of the argument posed by the respondent, such a task could be performed with absolutely no reference to functional details of the employee's job.

Respondent leaves no doubt that this is the theory it would have the Court accept for at the very outset of its Brief it raises the false cry of the "type of employee"[4] involved in the suit and muffles the real problem of whether ". . . any part of [that employee's] duties . . . shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce . . ."

## Point II.

### Respondent's Statement of Petitioner's Position With Respect to Coverage Under the 1939 Amendment Is a Gross Distortion.

At this late date there is no excuse for any misunderstanding of our position, which is a matter of record and repeatedly so. Twice now respondent has attempted to put before the Court a statement of our argument which bears no resemblance to that which was made. In Certiorari proceedings respondent stated in its Brief:[5]

> "Petitioner contends . . . that following the 1939 Amendment the remedy became available to any employee regardless of the nature of his work, provided only that his duties have *some eventual* effect on the interstate business of the carrier." (Emphasis supplied.)

We dealt with this distortion in our Reply Brief on that occasion.[6]

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4. Respondent's Brief, "Summary of Argument", p. 4; "Argument", p. 7.

5. Respondent's Brief In Opposition To Petition For Writ Of Certiorari, p. 4.

6. Petitioner's Reply Brief, pp. 3-5.

For what we assume are the obvious reasons, respondent has now apparently abandoned any attempt to raise this straw-man again. It has, instead, and for the first time in the history of the case, posed the full-blown contention that we claim coverage by the FELA of *all* railroad employees. This is nothing less than contrived deception. It is repeated far too frequently in respondent's Brief to be treated as a casual error or an unimportant inaccuracy. We have set out in the margin the lengths to which respondent has gone to drive this distorting wedge into the case.[7]

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7. The following references indicate those occasions in respondent's Brief when it has either attempted to fix this false position upon us or has argued against that false position by creating it in a context where it never existed. All emphases are supplied.

p. 5: "Its purpose was not to bring *all* railroad employees within the scope of the federal legislation. . . ." We have never made any such claim.

p. 5: "The proof of the fact that the 1939 Amendment was intended to enlarge the scope of the Act only to a limited extent rather than to embrace *all* railroad employees and supplant the state remedies. . . ."

p. 6: ". . . and not with a general broadening of the Act which would bring *all* employees within its coverage."

p. 6: ". . . Congress would have used broader language had it intended to bring *all* railroad employees within the Act."

p. 6: ". . . the Act was not intended to make the FELA the *exclusive remedy* for *all* injured railroad employees . . ."

p. 8: "The petitioner claims that the 1939 Amendment brings within the scope of its provisions *virtually all* employees of a railroad engaged in interstate commerce and Chief Judge Biggs, in his dissenting opinion, apparently accepted that view." This temporary deviation from the universal belongs in the present catalogue of distortions because although momentarily abandoning an attempt to allege that we claim blanket coverage, the respondent has paraphrased Judge Biggs' dissenting opinion in terms of a virtual blanketing when in fact he said in quoting *Scarborough v. Pennsylvania R. Co.*, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605. ". . . Most railroad employees come within its scope", *Reed v. Pennsylvania Railroad Company*, 227 F. 2d 810, 814 (C. A. 3, 1955). We have said nothing

## Point III.

## It Is Now Certain That Respondent Is Urging a Test Based on Physical Proximity, and It Is Equally Certain That Such a Test Is Untenable.

We proposed in our Brief [8] that the claim "interstate commerce" means "interstate transportation" is really symboljsm for an underlying truncated theory of the 1939

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more than this. In the context of respondent's Brief, it is obviously more appropriate to speak of "virtually all" than "most".

p. 13: ". . . Congress, when it enacted the Act of 1908, had no intention of including *all* employees within its provisions." Since respondent is urging that the 1939 Amendment covered the same "classes" as the 1908 legislation *a fortiori* this quotation fit within the present catalogue.

p. 15: "Congress was not unaware of the social undesirability of requiring *all* railroad employees to prove negligence in order to recover and face the uncertainty, delay and expense of a jury trial."

p. 21: "Since the House made no suggestion at all to alter the coverage of the Act, it is vain to attribute to it an intention to *revolutionize* the coverage." "Revolutionize" is a word completely consistent with blanket coverage.

p. 24: "The reenactment of that paragraph also demonstrated the absence of any intention to bring within the coverage of the Act the great mass of railroad employees who were engaged in intrastate or local activities." We have repeatedly urged the necessity of establishing the relationship with interstate commerce that is comprehended by the 1939 Amendment before the Amendment can be operative. This quoted portion of respondent's brief thus again confirms an argument which the respondent is having with no one but itself.

p. 25: "It should be noted that the two clauses which are said by petitioner to 'open up' the Act to *all* railroad employees". . . . Compare this with the following quotation from the Petitioner's Brief on the Merits, p. 24:

> "Note, too, that under this test there can be put to rest the traditional concern of where to draw the Federal Employers' Liability Act coverage line. As indicated, *function* and not the misleading labels of job *status* or *title* should control. It can thus be seen that under this test there *are* railroad employees who would not receive Federal Employers' Liability Act coverage. An office worker, as such, (but another label) may or may not be covered. More must be known of the precise function. Petitioner here is an office

Amendment which makes physical proximity to the classical stuff of railroading the touchstone of coverage under that statute. Respondent has at last confirmed that interpretation. It states at pages 12-13 of its Brief:

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worker who, we submit, is clearly within the ambit of the Federal Employers' Liability Act."

pp. 25-26: "In addition, it precludes a rational argument that *all* employees were intended to be brought within the Act by these clauses."

pp. 26-27: "If 'furtherance' is given a meaning broad enough to embrace *every* employee of a railroad carrier, the remainder of the paragraph is redundant and without sensible meaning."

p. 30: "If, as petitioner contends, *virtually all* railroad employees were brought within the Act. . . ."

p. 30: "Why should Congress indulge in such meaningless circumlocution if, in fact, its purpose was to make the Act apply to *all* employees of an interstate carrier." The answer, of course, is that in fact its purpose was not to make the Act apply to all employees and, therefore, no meaningless circumlocution is involved.

p. 30: "In essence, petitioner contends that the Court must find in the language of the Amendment an intention on the part of Congress to reach out and embrace railroad employees who are not transportation workers including those who are solely engaged in intrastate and local activities." This is fantasy heaped upon fantasy.

p. 36: ". . . there is nothing in the [*Santa Cruz*] opinion which would warrant the inference that those words provided a magic formula which meant that their mere use would bring *all* employees within the scope of an act."

p. 36: "It dealt with that possibility not by bringing within the Act *all* railroad employees and asserting that *all* of them affected commerce, for that was not its intention."

pp. 36-37: "The purpose of the language employed was both inclusive and exclusive, and there is no room for inference that the real purpose of Congress was to bring within the coverage of the Act employees whose duties were local and intrastate and had no relationship to transportation."

p. 38: "Petitioner ignores the long series of decisions by this Court interpreting the 1908 Act, suggests that the legislative history is 'completely useless' in resolving the issue presented in the case at bar, and argues that various federal and state decisions since the Amendment support the proposition that employees engaged in intrastate or local activities are encompassed within the broadened scope of the FELA coverage." It is extremely interesting to observe that

"The opinions of this Court reflect a frank recognition of the fact that the purpose of the Act was to provide a special remedy for those railroad employees who faced the special hazards of railroading. [citation] The decisions confined recovery to those who were actually engaged in transportation or those who, generally speaking, were in close physical and practical proximity to the instrumentalities of transportation, the 'cars, engines, machinery, track, roadbed, works, boats, wharves or other equipment', which were specifically mentioned in Section 1 of the Act. Where there was physical proximity to interstate transportation or its instrumentalities, the Court found the necessary close relationship to transportation which made the work of the employee 'in practice and in legal contemplation a part of it.' [citation] . And conversely, those whose duties did not bring them into physical proximity to such transportation or its instrumentalities were said to be without the scope of the Federal Act and within the coverage of the state laws. Clerical workers, for example, whose duties confined them to the sanctuary of the upper floors of an office building, faced no haz-

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in a brief which otherwise does not want for purported documentation this statement begs for a footnote.

p. 46: "There are two decisions in this Court which clearly demonstrate that the FELA does not cover *all* railroad employees."

p. 46: "Shortly thereafter, in *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334 (1953), there was a direct ruling that the 1939 Amendment did not have the effect of making the FELA the exclusive remedy of *all* railroad employees."

p. 50: "On the other hand, all employees whose duties are exclusively concerned with local and intrastate activities are no more to be found within the cases permitting recovery under the Act after the Amendment, than they were found within the ones decided prior to 1939."

p. 51: "Once it is clear that the Act was not intended to embrace *all* railroad employees within the scope of its coverage, the fate of petitioner's FELA claim is no longer open to doubt."

8. Petitioner's Brief, pp. 9-10.

ards peculiar to the railroad industry since their duties did not bring them into proximity with any of the instrumentalities of transportation."

Two cases are cited by it in support of its proposition that "clerical workers" ". . . were outside the coverage of the (1908) Act".[9] *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1922) and *N. Y., N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 419 (1932).

In neither case is that the holding. In each the Court had before it facts involving the duties of repair workers and not "the type of employee" in the instant case. This Court has never ruled either under the 1908 Act or under the 1939 Amendment on a set of facts akin to those here. If the scope of the 1908 Act were coextensive with that of the 1939 Amendment (which, of course, it was not) and if the Court had held as respondent asserts (which, of course, it did not), we trust we would not be here now.

Note further that the focus in each of the cited cases was on the question of interstate commerce, not physical proximity to hazards peculiar to the railroad industry.

Having used these cases to establish a "physical proximity" test, respondent then attempts to engraft it into the 1939 Amendment by claiming that the latter legislation had no purpose other than to abolish the "moment of injury rule", and that all else that went before remained as before. "Interstate transportation" is said to be preserved in the Amendment, notwithstanding the absence of the term from the statute, the negation of that terminology by courts, both state and federal, and responsible students of the subject[10] and the embarrassing illogicalities to which its

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9. Respondent's Brief, p. 13.

10. These considered views are not isolated nor have we had to strain to find them. They represent the overwhelmingly dominant view of the Amendment's newly enlarged scope, yet respondent remains insistent in the face of them. For instance, Dean Vernon X. Miller, whom respondent did not hesitate to cite, has made a series of germane observations in AN INTERPRETATION OF THE ACT OF 1939

alleged corollary of physical proximity to the hazards of such transportation lead.

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(FELA) TO SAVE SOME REMEDIES FOR COMPENSATION CLAIMANTS, 18 Law & Contemporary Problems 241 (1953):

"The year 1939 was a milestone in the story of the Federal Act. The statute was amended [Citation], the rigid transportation test for interstate commerce was rejected, and assumption of risk was classified with contributory negligence. Interstate commerce was expanded to include more than transportation, and the scheme of the statute was extended to cover work injuries happening to anyone, any part of whose duties are in furtherance of such commerce. The old distinctions in the case-law results had seemed artificial to many lawyers [Citation]. From the story of the litigation in the years before 1939, from the discussions in the houses of Congress, and from the text of the statute as amended, one deduction seems obvious. Congress was trying to cure a bad situation. Congress was trying to rescue the Court from legalisms that were sterile. The transportation test was devised by the Court within a few years after the date of the adverse decision on the first Federal Act [Citation]. Under the commerce clause the Court had said in that first case that Congress could regulate only those injuries that were suffered by railroad men who were engaged in interstate commerce when they were hurt [Citation]. If that premise is true, the pinpoint test for transportation does have meaning. However, during the years between 1908 and 1939 the Court in other cases touching other fields had gone far to agree with Congress that regulatory powers over commerce are great enough to affect not only the carrying and selling of goods in commerce but even the steps preliminary to the production of goods for interstate commerce [Citation]. There is little if anything in the history of previous litigation, in the floor discussion, or in the text of the statute to support a deduction that Congress was trying to close a gap and to shut off all other possible remedies, unless it is found in the *Winfield* case and the silence of Congress." (Pp. 244-245).

"The scope of the statute now is so comprehensive that there are few railroad employees who are not covered by it [Citation]. If any employee does anything as a part of his daily routine pertaining to interstate commerce under the expanded definition, he can process his case under the federal statute no matter what he was doing when he was hurt." (P. 248).

"Nevertheless, in 1939 Congress did not literally confirm, or restrict, or modify the doctrine of the *Winfield* case. Nor did Congress consider the probability of concurrent programs in any area, but Congress did plan a series of changes to extend the remedial protection of the Federal Act to more railroad personnel." (P. 254).

If "physical proximity" is the determinant, would not Miss Reed be covered if she did precisely the same work in a railroad shanty on a freight yard siding, rather than in respondent's 32nd Street Building? Does not respondent's building which is in fact but a stone's throw from its main lines to Washington and the West meet the test of physical proximity, or is there some linear measure beyond which coverage cannot reach? If Miss Reed is not covered because she lacks physical proximity, certainly a "clerical worker" such as a master-train dispatcher working on Miss Reed's floor could not be covered. Yet there can be no doubt that although his "category" should exclude him and his distance from the adbed should place him beyond the sweep of the 1939 Amendment, the glaring truth is that if he is not covered the Amendment means nothing. Or does the fact that he wears a white collar mean as a matter of law that no part of his duties involve ". . . the furtherance of interstate . . . commerce . . ., or . . ., in any way directly or closely and substantially, affect such commerce. . . ."?

## Point IV.

## The Scope of the 1939 Amendment Cannot Be Delineated by Respondent's Theory of the Pre-1939 "Classes".

The assertions that the categories named by respondent in the 1908-1939 period were continued precisely the same in the post-1939 period and that to fall outside of such categories is to fall outside of "interstate transportation" and the 1939 Amendment smothers credulity.

First, assuming *pro arguendo* that respondent's classification of the pre-1939 "classes" [11] is exhaustive and meaningful, there is not a shred of evidence that Congress ever had any such rigid categories in mind or ever contemplated petrifying them and them alone into the 1939 Amendment.

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11. Respondent's Brief, pp. 24-30.

Second, there is not a bit of authority to document the remarkably conceptualistic reasoning by which respondent has disassembled the language of the 1939 Amendment and reconstructed it to form the same three rigid categories.

Third, such an interpretation can only be reached by torturing the accepted meanings and usages of the words in the 1939 Amendment.

Fourth, cases arising under the 1939 Amendment reflect the falsity of the categories.[12]

Finally, this theory of the "classes" assumes that American railroads have come down the years with an unchanging physical nature and unchanging "types of employees". It leaves no room for the massive industrial transformations that have taken place in America's railroad system, the consequent development of job classifications unknown at the time of the enactment of the 1908 statute, nor the creatively pragmatic approach our courts have used in dealing with such new situations.

Let us be specific in suggesting the kind of difficulties presented. Automation has entered the railroad industry. Machines which were once man-operated are becoming machine-operated. A major technological change is under way, for instance, in yard-classification systems. It involves the displacement of men from duties which are now being prosecuted by electronic techniques and devices for the sorting and routing of railroad cars. Automating machinery, unknown until the recent past, is appearing in new railroad freight yards. These devices call for the applica-

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12. See, for instance, *Masterson v. Pennsylvania R. Co.*, 182 F. 2d 793 (C. A. 3, 1950). Counsel here were of record in that case as well. The record of the case indicates that plaintiff was a coal inspector whose duties were to go to the mines where the employer bought coal and inspect the coal for quality. Plaintiff was injured in an automobile accident in which he was driving a vehicle rented by the defendant-railroad and furnished by defendant to plaintiff for his business trips. Interestingly, defendant there admitted plaintiff's engagement in interstate commerce. Compare that set of facts with the categories suggested by the respondent and with the "transportation" and "physical proximity" tests it is now proposing.

tion of job skills and functions unknown in an earlier era of cowcatchers and wood-burning engines. They will undoubtedly bear job labels in keeping with the mid-century American tongue, labels unknown in an earlier period of railroad history. The job label of a carrier employee feeding coded tape into a digital computer whose impulses will daily sort and route thousands of box cars of the nation's railroads will bear no resemblance to anything respondent has suggested are the categories within "interstate transportation". On respondent's analysis, therefore, he could not be covered even if we assume he operates the computer next to a railroad track.[13] Why? The job classification is not one re-enacted by the 1939 Amendment. The fact that reason and obvious functional realities demand a conclusion that such a job duty is quintessentially ". . . the furtherance of interstate . . . commerce . . . or . . . directly or closely and substantially, affect[s] such commerce . . ." points up the sterility of the theory.

So, too, consider the imminent entry of nuclear power into America's railroad installations. New job classifications, new job duties and functions undreamed of in the distant or recent past will arise. The results to which respondent's theories would lead when applied to these unprecedented "types of employees" would be ludicrous.

The conclusion is plain. The effectiveness of the 1939 Amendment depends on the application of practical reasoning to the functional realities of the job duties in question. This is the sum of our argument. Such reason is the only key to whether Miss Reed's job duties or those of any other employee of an interstate carrier by rail meet the requirements laid down in the Amendment. If job function leads to a conclusion that the FELA must apply, as it does here, then the Act should be applied. Reason should have so led

13. Possibly the computer would be an "instrumentality of transportation" proximity to which would obviate the employee having to do his job by a roadbed before fulfilling this alleged precondition of coverage under respondent's view of the Act.

the majority below, but it arbitrarily refused to invoke the Act. Putting reason aside for an unrewarding excursion into conceptualism, respondent never entered the area in which this problem genuinely exists. That is why its final position bears so little resemblance to that of the majority below and why it could draw its conclusion without a single reference to the facts at bar.

## Point V.

## Respondent's Comparison With Other Legislation Does Nothing to Elucidate the Question at Bar.

We fail to see what significance in the context of this case can be drawn from Congress's failure to occupy the entire field covered by its power under the Commerce clause. Conceding *pro arguendo* that all employees of interstate carriers might be covered by appropriate federal legislation, how does Congress's failure to so act resolve the question of whether petitioner is covered by the 1939 Amendment?

The uselessness of this portion of petitioner's argument appears in its summary of Argument at page 6 of the Brief:

> "A comparison of the Amendment with the language of earlier and contemporary legislation involving the commerce power shows that Congress would have used broader language had it intended to bring all railroad employees within the Act."

This might have some bearing on the case if there had been a question of whether or not the Act covers all railroad employees. We have never so contended, as we have repeatedly indicated. This is a representative example of respondent arguing with itself in a void.

## Point VI.

## The Workmen's Compensation Argument.

We flatly refuse to be drawn into any contention about the merits of workmen's compensation systems as against the remedies under the FELA or any alternative method for the redress of injuries sustained by employees of carriers by rail. The question of whether or not the remedies afforded under the FELA are adequate is not before this Court nor, in the constitutional scheme, should it be.

Respondent has crassly injected it into the case. It is diversionary and deserves to be treated as such.

Presumably we are before the Court on its summary docket because of the limited question presented by the facts at bar, and we intend to hew to the demands of that question. We cannot leave this area, however, without registering a strong objection to the note of impertinent paternalism on which respondent has closed its argument, suggesting that Miss Reed "is much better off"[14] with the remedies provided by local law than those afforded her under the FELA. It smacks of the same turn-of-the-century attitude in which this whole problem has been approached and handled by the respondent.

## Point VII.

## The Straub Case.

### A. Respondent's Treatment of the Case.

Respondent's attempt to deal with *Straub v. Reading Company*, 220 Fed. 2d 177 (C. A. 3, 1955) has taken on an increasingly extraordinary character. In certiorari proceedings, it sought to negate a conflict between the *Straub* decision and this one below on grounds that Straub's job "brought him on occasion to the cabs of the locomotives

14. Respondent's Brief, p. 51.

[not a part of the record in the case] and he traveled from state to state." [15]

As we suggested then, the *Straub* Court said at 183:

". . . but that fact has no bearing on whether his duties furthered or substantially affected interstate commerce."

Respondent now cites *Straub*,[16] for the proposition that it does not justify coverage for petitioner nor is it inconsistent with respondent's interpretation of the 1939 Amendment. It then quotes, not the opinion of the Court of Appeals for the Third Circuit, but our brief there, in which we argued, *inter alia*, the fact of Straub's travel in four states. We abide by the ruling of the *Straub* court, *supra*, and have argued accordingly below and here. But respondent obviously refuses to do so in this closing note of desperation.

There is no alchemy by which a fact held irrelevant by a Court of Appeals can be transformed into a relevant one by quoting it from a brief submitted by a litigant to that Court of Appeals.

**B. Respondent's Analysis of the Classes Covered by the 1939 Amendment Cannot Subsume the Straub Case.**

We submit that respondent's analysis of the groups covered by the 1939 Amendment is verbalism. It is sufficient in that connection to observe as we have argued the remarkable intra- and inter-circuit conflicts generated by the majority's refusal to follow its own ruling in the *Straub* case. That case, the correctness of which respondent has never disputed, simply cannot be squeezed within the shrunken confines of any of the three concentric circles proposed by respondent.[17] If it can, then *a fortiori* this

15. Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 23.

16. Respondent's Brief, p. 39.

17. Respondent's Brief, p. 29.

case must, for the instant facts are much less attenuated coverage-wise than *Straub*.[18]

Straub worked on the sixth floor of the Reading Terminal Building in Philadelphia and was injured there while helping a female fellow employee remove some office forms from a high shelf above. The ladder which caused the injury was propped against some filing cabinets at the time of the accident.

If the truncated "transportation view" and respondent's theory of "physical proximity" were applied to the *Straub* facts, Straub could not conceivably be covered by the 1939 Amendment. Certainly he is not a train crewman, switchman, signalman, crossing watchman, yard employee, maintenance worker or repairman.[19] He was not "in close physical and practical proximity to the instrumentalities of transportation, the 'cars, engines, machinery, track, roadbed, works, boats, wharves, or other equipment' ".[20] He was one of a railroad's "clerical workers . . . whose duties confined [him] to the sanctuary of the upper floors of an office building, faced no hazards peculiar to the railroad industry since [his] duties did not bring [him] into proximity with any of the instrumentalities of transportation".[21] He "faced only the hazards of file cabinets and other office furniture and the floors and windows of an office building."[22]

*Straub* was correct. The respondent agrees that it was correct and has never argued otherwise. That set of facts, not as strong as those at bar, was properly held within the ambit of the 1939 Amendment because *job function* was the one critical aspect of the case that controlled just as it should be here.

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18. Petitioner's Brief, pp. 25-27.
19. Respondent's Brief, p. 11.
20. Respondent's Brief, p. 12.
21. Respondent's Brief, p. 13.
22. Respondent's Brief, p. 51.

## Point VIII.

### Respondent Has Completely Ignored, Not Only the Facts at Bar, But the Opinions of the Court of Appeals.

We have urged that the majority of the Court of Appeals committed error of such immediate and far-reaching significance that its judgment should be reversed. The error of the majority inheres in its judgment and the opinion which shaped that judgment.

That *opinion* merits the most careful consideration because unless rendered nugatory by a reversal of the judgment below, it must, for the reasons we urged, generate widespread confusion and a rash of appeals throughout our courts on the large question of the scope of the 1939 Amendment.

We have faced that opinion, analyzed it, and centered much of our argument upon it. Our argument against its error is now a matter of record, here and in certiorari proceedings, but not once in its entire argument of 51 pages has respondent as much as touched upon it, except to characterize the majority's opinion as "well-reasoned"[23] and then proceed on a course of reasoning thoroughly unrelated to that propounded by the majority.

So too the instant facts have been totally ignored in respondent's argument. This is clinching proof of the great disservice that would be done were its theory of the 1939 Amendment accepted. We contended earlier that it would make barren classifications the sole basis for administering this important statute, and we submit that the Court has before it in respondent's Brief what could be the first exhibit in a phenomenally grave development in the FELA history: the disposition of a square question of coverage under the 1939 Amendment without a single reference to the facts which raise that question.

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23. Respondent's Brief, p. 2.

## Point IX.

**If Not Reversed, the Decision Below Will Excise Great Numbers of Carrier Employees, Such as Petitioner from the Protection of the Act.**

It is claimed that we have not documented this assertion [24] and the term "clerical employee" is raised again by respondent. We alluded to employees whose job duties meet any of those necessary relationships set out in the 1939 Amendment. Of course, no final documentation is possible for the Court has not yet ruled upon the judgment below.

We spoke in predictive terms, and we did not speak idly. We believe deeply that the opinion of the majority below, if not reversed, will shrink coverage under the Act. In the Appendix herewith, we have set out a series of cases now in litigation under the FELA. They are cases in which our learned opponents here represent the same defendant, respondent here, and we represent plaintiffs therein all of whom were employees of respondent.

They are suits in which this respondent, by its counsel, filed answers to complaints subsequent to November 17, 1955 the date of the filing of the opinion on the Court of Appeals in the present litigation. In each case the complaint alleges plaintiff's engagement in interstate commerce. In each case the answer denies that allegation.

After 1939 and prior to the filing of the opinion below, cases involving job duties such as those set out in the Appendix would rarely have evoked such an answer to this allegation. We are now witnessing the emerging results of the majority opinion, and if not cut off at their roots by a reversal of the judgment below an immense area of litigation made fallow by the 1939 Amendment is going to breed again.

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24. Respondent's Brief, p. 45, fn. 72.

## CONCLUSION.

The traditional guides to statutory construction point clearly to an interpretation of the 1939 Amendment which credits that legislation with a much broader scope of coverage than prior legislation in the field. This view of the Amendment which is substantiated in case law by the great weight of state and federal decisions and by responsible students of the legislation is, however, but a setting for present purposes and not an analytical instrument for treating the question raised by the facts at bar. In that sense it is of no dispositive use. The issue must be met through the facts which generate it, and to do this unhelpful symbols, petrifying concepts of the legislative and judicial processes, and arrant legalisms which hinder the application of reason to fact must be put aside.

The facts are clear and, in truth, agreed upon by the litigants. We contend they make the 1939 Amendment operative because, and solely because, the job functions of petitioner demonstrated by those facts fall fairly within any reasonable meaning credited to the language of the 1939 Amendment, a kind of meaning which respondent calculatedly avoids in its argument. The confusion or withdrawal of those job duties, as a matter of explorable causation, unavoidably would ramify throughout respondent's interstate system immediately and directly with consequent impedence or cessation of a great tributary in the flowing system of interstate commerce. If the 1939 Amendment does not comprehend this situation, there is no satisfactory obvious or occult explanation of what that legislation could mean.

The majority of the Court below, and the respondent, have never denied the deleterious effects upon interstate commerce which would come close upon the cessation or confusion of petitioner's job duties. The majority below fell into error by acknowledging the force of these facts.

and then turning from them in an arbitrary refusal to allow them to become legally operative. The respondent falls into error in refusing even to reach that level of analysis by blindly avoiding the facts at bar.

The error in each instance is sourced in preoccupations with legally irrelevant considerations of job status, titles and the relative importance of the carrier employees to the exclusion of the only germane inquiry: job function as it relates to interstate commerce in any of these modes specified by the 1939 Amendment. The error is compounded by an unwarranted transmutation of "interstate commerce" to "interstate transportation" to "railroading" that is in reality the manipulation of a broad congressional concept of coverage into a pinched and untenable theory of FELA coverage. Respondent's proposed tests for an ill-defined "physical proximity" and an even more ill-defined "instrumentalities of transportation" only aggravate the matter.

The petitioner's job duties indubitably place her within the four corners of the 1939 Amendment. The judgment below should therefore be reversed.

Respectfully submitted,

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## APPENDIX.

The following cases were all brought in the United States District Court for the Eastern District of Pennsylvania and bear that Court's Civil Action number and the date answers were received in each case.

1. *Bilka v. P. R. R.*, No. 20129: Answer received February 8, 1956.

Plaintiff was a car-repairman employed by defendant at defendant's Freight Shop No. 2 in Altoona Car Shop, Altoona, Pennsylvania, whose job was to burn welds or any pieces of metal necessary to place a side sheet and repair a box car. The answer admits plaintiff's employment by the defendant as a car-repairman at the shop aforementioned, and as its third defense, alleges that the Court has no jurisdiction over the subject matter of the case.

2. *Deanes v. P. R. R.*, No. 19810: Answer received December 5, 1955.

Plaintiff was employed by the defendant as a loader and trucker at defendant's Front and Federal Street freight station in Philadelphia, Pa. The answer admits that plaintiff was so employed. Plaintiff loaded and unloaded freight cars traveling through defendant's entire system.

3. *Berkheimer v. P. R. R.*, No. 20128: Answer received March 5, 1956.

Plaintiff was a car-repairman's helper in the employ of the defendant at its west-bound shop in Altoona, Pa. He was injured while installing a coupler on a hopper car and working on a coupling machine used in the installation of

couplers on box cars. The answer admits that plaintiff was employed by it as a car-repairman's helper and worked at the aforesaid shop. The answer alleges, as a third defense, that the court has no jurisdiction over the subject matter of the case.

4. *Alamprese v. P. R. R.*, No. 20049: Answer received February 6, 1956.

Plaintiff was employed by the defendant as a car repairman in its Altoona Freight Shop in Altoona, Pennsylvania. Plaintiff's employment in that capacity is admitted by the answer. Plaintiff's duties were to fit couplers onto freight cars and to buck rivets.

5. *Possumato v. P. R. R.*, No. 19813: Answer received December 2, 1955.

Plaintiff was employed as a stationary fireman at defendant's South Altoona Boilerhouse, and in its answer, defendant admits such employment. Plaintiff fired boilers which powered generating equipment for defendant's car shops. Defendant alleges as its third defense the Court's lack of jurisidiction over the subject matter of the case.

IN THE

# Supreme Court of the United States

October Term, 1955.

## No. 621.

MARTHA C. REED,
*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PENNSYLVANIA RAILROAD COMPANY,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### QUESTION PRESENTED.

Is a file clerk entitled to maintain an action for personal injuries under the provisions of the Federal Employers' Liability Act when it appears that her sole duty on behalf of her employer, an interstate railroad, was to carry tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building?

## STATEMENT OF THE CASE.

This was an action for personal injuries brought under the Federal Employers' Liability Act. The pleadings consisted of a complaint and an answer, which admitted that respondent was engaged in interstate commerce and that petitioner was its employee, but denied that petitioner was engaged in interstate commerce. After filing its answer respondent took petitioner's deposition and answered interrogatories propounded by petitioner.

Chief Judge Kirkpatrick (United States District Court, Eastern District of Pennsylvania) granted respondent's motion to dismiss on the ground that petitioner's deposition and respondent's answers to interrogatories established that petitioner was not furthering interstate commerce or directly or closely and substantially affecting such commerce and that, therefore, her claim was not within the provisions of the Federal Employers' Liability Act. From the order of dismissal, petitioner appealed to the United States Court of Appeals for the Third Circuit which, in an opinion written by Judge Goodrich, affirmed the decision of the District Court. Chief Judge Biggs dissented on the ground that, although "such a result may be unfortunate", Congress, in adopting the 1939 Amendment, apparently intended to bring most railroad employees within the scope of the Act.

In her deposition, petitioner stated that the accident occurred during her lunch hour on July 19, 1951, when a wind and hail storm blew in a window and she was cut on the right arm (30a-35a).

She testified that for eight or nine years her job classification had been "print maker", her duties had been what she would call those of "a file clerk" and her work consisted exclusively of "filing" transparent prints in the office of the Mechanical Engineer on the fifth floor of respondent's 32nd Street Building in Philadelphia (22a, 23a,

24a). In elaborating upon the details of her job she described it as follows: she was handed an order to remove certain numbered papers from a filing cabinet; she removed the needed tracings from the file and gave them to a man in the blueprint department; when he completed his use of those papers he returned them to her and she replaced them in the file cabinet; these were her only duties (23a, 27a, 28a, 29a, 30a, 54a).

The work of the department of the Mechanical Engineer included the preparation of blueprints from tracings of equipment used on all parts of respondent's railroad. The tracings were kept on file in that department and the blueprints made from the tracings were sent to all states through which the railroad operated its interstate system (19a, 20a, 23a, 27a, 29a). However, petitioner had nothing whatever to do with the preparation of the prints nor with their distribution to other parts of the railroad system (54a).

## ARGUMENT.

### A. Introduction.

The reasons which have been cited by petitioner in support of the petition for granting of certiorari in this case are not valid. There is no conflict between the decision of the Court below and those of this Court, the other Circuits or the State courts, and there is no compelling reason why this Court should pass upon the question of whether a file clerk is entitled to maintain an action under the Federal Employers' Liability Act.[1] Since its adoption, the Act has been interpreted as providing a remedy for railroad employees engaged in interstate transportation.[2] Petitioner contends, however, that following the 1939 Amendment[3] the remedy became available to any employee regardless of the nature of his work, provided only that his duties have some eventual effect on the interstate business of the carrier. It is submitted that in rejecting that contention, the Court of Appeals did no more than apply a well-established interpretation of the Act to the facts in the case at bar and that the decisions on which petitioner relies are consistent with the ruling of the Third Circuit in this case.

The applicability of the Act to a particular employee is governed by Section 1. That section is composed of two paragraphs, the first being enacted in 1908 and reenacted in 1939 and the second being added by the 1939 Amendment. Eliminating non-essentials, the section reads as follows:

> "Every common carrier by railroad while engaging in (interstate) commerce . . . shall be liable in damages to any person suffering injury while he is

1. Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C. § 51.
2. *Shanks v. D., L. & W. Railroad Co.*, 239 U. S. 556 (1916).
3. Act of August 11, 1939, c. 685, 53 Stat. 1404, 45 U. S. C. § 51.

employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of . . . employees of such carrier, or by reason of any defect . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

To obtain a true interpretation of the coverage of the Act requires a review of the scope of the 1908 Act, the language of the 1939 Amendment, the legislative history of the Amendment, and the judicial interpretation of the Act from 1939 to date.

## B. The Scope of Applicability of the Employers' Liability Act Prior to the 1939 Amendment.

The framework of the 1908 Act [4] was governed by Congress' determination that it should escape the fate of its predecessor, the first Employers' Liability Act,[5] which was enacted in 1906 and declared unconstitutional by this Court in 1908. The scope of the earlier Act and the reason for its invalidation are summarized in the following sentence from the opinion in *The Employers' Liability Cases*, 207 U. S. 463, 498 (1908):

4. Throughout this brief we are discussing the provisions of Section 1 of the Act which is set forth above. The first paragraph was Section 1 of the Act as originally enacted in 1908. It was reenacted without change in 1939. The second paragraph was added by the 1939 Amendment.

5. Act of June 11, 1906, c. 3073, 34 Stat. 232.

> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employés, without qualification or restriction as to the business in which the carriers or their employés may be engaged at the time of injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

In the light of that opinion, Congress narrowed the scope of the Act's coverage and in Section 1 expressly limited recovery to injuries suffered by the employee "while he is employed by such carrier in such commerce".

In its interpretation of the 1908 Act, this Court did not undertake to draw a functional line and include within the coverage of the Act those who had interstate duties and exclude those whose duties were intrastate. It approached each case without regard to the essential nature of the duties of the employee who was injured and looked only to the character of the *transportation* in which he was engaged *at the moment of injury.* If the transportation or instrumentality of transportation was interstate at that instant he was covered, if it was not, he was relegated to the compensation laws of the states.[6]

Thus, in the early case of *Pedersen v. D. L. & W.*, 229 U. S. 146 (1913), a carpenter, whose duty it was to repair a bridge which carried interstate traffic, was injured while carrying some bolts and rivets to the bridge. Recovery was based on the fact that the bridge was an "instrumentality of interstate commerce" and the work was "so closely connected therewith as to be a part of it" (page 151).

Thereafter in *Illinois Central v. Behrens*, 233 U. S. 473 (1914), the "moment of injury" test was formulated. The deceased, a member of a switching crew handled interstate and intrastate trains indiscriminately. He was killed

6. *New York Central R. Co. v. Winfield*, 244 U. S. 147 (1917).

while moving an intrastate train and recovery was denied for that reason.

Finally, in *Shanks v. D. L. & W.*, 239 U. S. 556 (1916), the Court made clear that recovery depended on employment in interstate *transportation*, saying at page 558:

> "the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

That test was applied again and again[7] and, after fifteen years, in *C. & N. W. Co. v. Bolle*, 284 U. S. 74 (1931), the Court said at page 79:

> "Since the decision in the Shanks case, the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated."

While this Court in its decisions was unwilling "to declare a standard invariable by circumstances or free from confusion . . in application",[8] the result of a long series of cases prior to 1939 was to render reasonably certain the classes of employees who were to be considered within the Act. Three groups were permitted to recover[9] (providing they were engaged in interstate commerce at the moment of injury):

(a) those engaged in train movements (the train crews[10]),

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7. In two cases, *Erie R. Co. v. Collins*, 253 U. S. 77 (1920), and *Erie R. Co. v. Szary*, 253 U. S. 86 (1920), this Court departed from the rule of the *Shanks* case. In *Chicago & E. I. R. Co. v. Commission*, 284 U. S. 296 (1932), those cases were expressly overruled for that reason.

8. *Industrial Accident Commission v. Davis*, 259 U. S. 182, 188 (1922).

9. For a substantially similar classification of the employees within the Act prior to the 1939 Amendment, see Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), page 1370.

10. *North Carolina R. Co. v. Zachary*, 232 U. S. 248 (1913); *Louisville & Nashville R. Co. v. Parker*, 242 U. S. 13 (1916).

(b) those whose duties were "connected with that movement, not indirectly or remotely, but directly and immediately" [11] (switchmen,[12] signalmen [13] and yard employees [14]), and

(c) those whose "work of keeping such instrumentalities (of interstate transportation) in a proper state of repair . . . (was) so closely related to such commerce as to be in practice and in legal contemplation a part of it" [15] (maintenance workers [16] and repairmen [17]).

It is apparent that the purpose of the Act was to provide a special remedy for those who were exposed to the hazards of the railroad industry [18] and that the interpreta-

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11. *St. Louis, San Francisco & Texas R. Co. v. Seale*, 229 U. S. 156, 161 (1913); *N. Y. Central R. R. v. Carr*, 238 U. S. 260, 264 (1914); *Erie RR. Co. v. Welsh*, 242 U. S. 303, 306 (1916).

12. *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114 (1913).

13. *Southern Pacific Co. v. Industrial Accident Commission*, 251 U. S. 259 (1920).

14. *Pecos v. Northern Texas R. Co.*, 240 U. S. 439 (1916).

15. *Pedersen v. D. L. & W. R Co.*, 229 U. S. 146, 151 (1913); *Shanks v. Del. L. & W. R. Co.*, 239 U. S. 556, 558 (1915); *Kinzell v. Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130, 133 (1919); *So. Pacific Co. v. Commission*, 251 U. S. 259, 263 (1910); *Chicago & N. W. Ry Co. v. Bolle*, 284 U. S. 74, 78 (1931); *New York, N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 420 (1931).

16. *Kinzell v. Chicago, M. & St. P. R. Co.*, 250 U. S. 130 (1919).

17. *Walsh v. N. Y., N. H. & H.*, 223 U. S. 1 (1912).

18. The philosophy underlying the Act was that which had inspired earlier railroad legislation in England, Continental countries and some of the States. See Reports of House Judiciary Committee, dated March 15, 1906, Report No. 2335 (1906 Act), and April 4, 1908, Report No. 1386 (1908 Act). In Report No. 2335 it was said:

> "In 1888 England passed an act which abolished the doctrine of fellow-servant with reference *to the operation of railroad trains*, and in 1897 it extended this law to apply to many of the *hazardous employments of the country*". (Emphasis supplied.)

In reporting on the 1906 Act, Representative Sterling said, 40 Congressional Record 4602:

> "I think it would apply to trainmen, switchmen, men in the roundhouse that have charge of the engines, and any other em-

tion which the court placed upon the Act in the years immediately following its passage supported that construction.[19] Clerical workers were not exposed to the hazards of railroading and this Court clearly recognized that they were not within the scope of the Act.[20]

### C. The 1939 Amendment.

The primary objective of the 1939 Amendment according to the legislative history (discussed *infra* page 15) was the complete elimination of the defense of assumption of risk. The secondary purpose, with which we are here concerned, was the abolition of the "moment of injury" rule. An examination of the language of the paragraph which was added to Section 1 by the Amendment shows no intention on the part of Congress to change the scope of the coverage of the Act and thus include any employees within its provisions other than those who were included in the three classes discussed above at pages 7-8. The Amendment merely eliminated the necessity that such employees be engaged in interstate transportation at the very time when the accident occurred.

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ployees whose duty relates to or is connected with the business of carrying commerce; but I do not believe it would go any further than that."

He made a substantially similar report on his presentation of the 1908 Act. A review of the entire legislative history of both Acts and the 1939 Amendment reveals that many examples were given as to the type of employee for whose benefit the legislation was intended. Not one employee is referred to outside the field of those exposed to the hazards peculiar to the operation of a railroad.

19. See particularly *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1921). In cases since the 1939 Amendment the purpose of the Act as it affects those engaged in "railroading" has frequently been recognized. See for example *Bailey v. Central Vermont R. Inc.*, 319 U. S. 350, 354 (1943) and the comments of Mr. Justice Frankfurter in his dissenting opinion in *Stone v. N. Y. C. & St. L. R. Co.*, 344 U. S. 407, 410 (1953).

20. *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1922); *N. Y., N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 419 (1932).

In the first place, it should be pointed out that the reenactment of the original section carried with it the "gloss of construction" which this Court had placed upon it,[21] and that included the well-established rule that, while couched in terms of "commerce", the Act was intended to deal with employees who were engaged in transportation.[22] An analysis of the provisions of the second and new paragraph shows very clearly that no change was intended by Congress in connection with this basic conception.

Three clauses of the Amendment deal with three classes of employees who are to be granted the benefits of the Act and it will be seen that these are the same three groups which were already within its provisions. The Amendment, however, freed them from the restrictions of the "moment of injury" rule:

> a. "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce";
>
> b. "Any employee of a carrier, any part of whose duties . . . shall, in any way directly . . . affect such commerce as above set forth"; and
>
> c. "Any employee of a carrier, any part of whose duties . . . shall, in any way . . . . closely and substantially, affect such commerce as above set forth . . ."

A review of the line of cases which this Court had decided prior to the Amendment and which had applied the "moment of injury" test makes the purpose of the first clause ("furtherance of interstate or foreign commerce") entirely clear. If, as suggested by Chief Judge Biggs in his dissent to the decision of the Court below, it had been Congress' intention to open the flood gates and bring most

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21. See *Francis et al. v. Southern Pacific Co.*, 333 U. S. 437, 450 (1948), and cases cited by Mr. Justice Frankfurter in *Commissioner v. Estate of Church*, 335 U. S. 632, 690 (1949).

22. *Chicago & N. W. R. Co. v. Bolle*, 284 U. S. 74 (1931).

railroad employees within the scope of the Act,[23] it would have been a simple matter for Congress to say so. There would have been no need to disguise the "furtherance" provision as one concerned with the elimination of the "moment of injury" test. The "directly or closely and substantially" clause would have been without purpose and entirely redundant. Above all, the retention of the language of the original section with the "gloss of construction" it had received from this Court negated the possibility that Congress intended to bring all employees within the Act. We submit that the meaning of the "furtherance" clause is perfectly clear when it is read in its context. "Furtherance" when applied to "transportation" was intended to mean "movement"[24] in the physical sense, and this clause of Section 1 was intended to retain within the scope of the Act all transportation employees regardless of their activities at the moment of injury.

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23. Appendix to Petition for Writ of Certiorari, p. 35.

24. The words "furtherance" and "furthering" were used in that general sense prior to the adoption of the Amendment. Thus in Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), it was said at page 1372:

> "a fireman on duty on a train carrying freight from one state into another is engaged in interstate commerce because he is actually furthering the movement of interstate traffic."

at page 1418:

> "For like reasons trainmen on such trains are furthering interstate transportation and hence subject to the federal Employers' Liability Act while picking up, at stations en route, cars to be included in the train and carried forward, regardless of whether such cars are themselves interstate or local in character."

and at page 1432:

> "The rule to be deduced from the foregoing cases would seem to be that if, in connection with a switching operation, any interstate purpose is intended or accomplished, the movement as a whole is in furtherance of interstate transportation; . . ."

See also *Erie Railroad v. Welsh*, 242 U. S. 303, 306 (1916); *Murray v. Pittsburgh Railroad Co.*, 263 Pa. 398, 401, 107 Atl. 21 (1919); *Hines v. Wicks*, 220 S. W. 581 (Tex. App., 1920).

This interpretation is supported by the wording of the second and third provisions. The second provides for those employees "any part of whose duties . . . shall, in any way directly . . . affect such commerce as above set forth". As pointed out above, the decisions of this Court prior to the Amendment did not confine recovery to those who were actively moving trains in interstate transportation. It also included those whose duties were "connected with that movement, not indirectly or remotely, but *directly* and immediately"[25] (emphasis supplied)—these being, in general, the switchmen, signalmen, yard and station personnel. The "directly" clause was obviously intended to apply to that group and to prevent them from losing the benefit of the Act if the transportation with which they were concerned at the moment of injury should turn out to be intrastate.

The third group of employees referred to in the Amendment consists of those "any part of whose duties . . . shall, in any way . . . closely and substantially, affect such commerce as above set forth". It is again apparent that in this clause Congress intended to eliminate the application of the "moment of injury" rule to the maintenance workers and repairmen, the third group of personnel who were covered by the Act before the Amendment. These had been included since they were among those whose "work of keeping . . . instrumentalities of interstate transportation in a proper state of repair . . . (was) so closely related to such commerce as to be in practice and in legal contemplation a part of it".[26] Such employees are further away from transportation than the train crews and the track and yard personnel of the first and second groups but closer to it than those whose duties are purely local or intrastate in character or do not involve any interstate activity whatever. Again we stress the fact that

25. *St. Louis, San Francisco Ry. v. Seale*, 229 U. S. 156, 161 (1913).

26. *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146, 151 (1913).

the phrase "such commerce as above set forth" ties the employees into interstate transportation in view of this Court's long-standing definition of the term "commerce" in the first and reenacted paragraph. In view of the necessary implications of the phrases "closely and substantially" and "such commerce", it would be difficult to make a serious contention that this clause could bring clerical employees who work in an office building within the provisions of the Act.

To summarize: the reenactment of the first paragraph of Section 1 and the context of the second paragraph permit only one explanation of the congressional purpose. The "moment of injury" rule was intended to be eliminated with reference to all classes of employees who, under the decisions of this Court interpreting the Act, had been included within its provisions. Thus the three groups which fell within the earlier rulings were covered in the following manner:

> a. within the "furtherance" of transportation clause, those actively engaged in moving the equipment of transportation;
>
> b. within the "directly" clause, the non-operating personnel who are immediately concerned with transportation; and
>
> c. within the "closely and substantially" clause the non-operating personnel who keep the instrumentalities of transportation—trains, track and roadbed—maintained and in repair.[27]

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27. Most of the cases decided after the passage of the 1939 Amendment, some of which contain language to the effect that the Amendment was intended to "broaden" the coverage of the Act a[nd] bring in employees not previously within its provisions, are entirely consistent with the interpretation set forth above. It should be remembered that the "moment of injury" rule eliminated two groups of employees: those who were generally engaged in interstate commerce but in intrastate at the time of the accident and those who performed work on equipment which was normally used in interstate

Transportation is the center of three concentric circles surrounding, respectively, each of the three groups. The second clause and its circle (yard men) are further from transportation than the first circle (the crews of the trains). The third circle (maintenance and repairmen) is still further removed from transportation than is the second. To give the "furtherance" clause a broader circle than the other two does violence not only to the first paragraph of the Section with its "gloss of construction" but to the whole context of the 1939 Amendment as well. It would make the Amendment read as though it said that in addition to the transportation employees who are brought within the Act by the provisions of the first paragraph, all other employees will be covered by the Act, *and then in addition* there will also be included those whose duties are closely related to transportation.

### D. Guides to Interpretation of the Amendment.

There are two sources outside the language of the Act itself which throw considerable light on the congressional

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commerce but which had been withdrawn from such commerce at the time of the injury. *Illinois Central R. Co. v. Behrens*, 233 U. S. 473 (1914), in which a member of a switching crew happened to be moving intrastate cars when he was killed, illustrates the first group; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353 (1917), in which plaintiff was injured while repairing a locomotive used in interstate commerce both before and after the accident, is an example of the second. Obviously, the scope of the coverage of the Act was very materially widened when these employees were brought within the Act.

See *Baird v. N. Y. C. R. Co.*, 229 N. Y. 213, 86 N. E. 2d 567 (1949), in which the Court said at page 569:

> "But the new 1939 language cannot, of course, be read off by itself. We know from the decisions above cited and many others, that the amendment was enacted in the light of two limiting rules of the cases: one, the so-called 'pin-point rule' forbidding recovery unless the work was interstate transportation or very closely connected therewith at the very time of the accident, and, second, the so-called 'back shop' rule which said that 'dead engines' in the course of repair were not instrumentalities of interstate transportation."

intention as expressed therein and support the contention that the sole purpose of the Amendment of Section 1 of the Act was the elimination of the "moment of injury" rule. One is the legislative history of the Act,[28] the other a comparison of the wording of the Amendment with contemporary federal legislation in which Congress sought to exercise its fullest power of regulation within the provisions of the commerce clause.

1) *The Legislative History.*

It has already been pointed out that when the 1906 and 1908 Acts were in the legislative process the Congressional Record indicates that Congress was primarily concerned with providing an effective remedy for those who sustained injuries because of their exposure to the peculiar hazards which are faced by transportation employees.[29] The legislative history of the 1939 Amendment shows that that same concern was again the dominant factor.

At the hearings of the Subcommittee of the Committee on the Judiciary of the Senate, 76th Congress, 1st Session, § 1708, March 28-29, 1939, T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, who was the principal witness to advocate the adoption of the Amendment, made it clear that it was not intended to go beyond the transportation employees already covered by the Act. He said, at pages 4 and 8:

> "The amendment of 1908 was intended to and did restrict the application of the act to employees of common carriers by railroad who were injured while the employees themselves were engaged in interstate commerce. The Court, in interpreting that section, clarified it to that extent, and perhaps it might be said they

28. *Steiner et al. v. Mitchell*, No. 22 October Term, 1955, decided by this Court January 30, 1956, 24 LW 4081.

29. See footnote 18, *supra*, page 8.

limited its application by *defining interstate commerce as being transportation in interstate commerce, so that the law really applies to train and enginemen and to other employees whose work is incidental to that sort of thing, men working in roundhouses, loading cars in interstate commerce, and so forth.*

* * * *

"Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act . . .*" (Emphasis supplied.)

The details of Senate Report No. 661, 76th Congress, First Session, June 22, 1939 (pp. 2-3) illustrate quite clearly that the broadened scope of coverage was intended to eliminate only the "moment of injury" test in both its troublesome aspects; i.e., what was the injured employee doing or for what purpose was the equipment on which he was working being used at the instant of his injury:[30]

"In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

* * *

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and

30. See footnote 27, *supra*, page 13.

which were, just before or just after the injury, used in such commerce.

* * *

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic."

Furthermore, prior to the passage of the Senate bill changes were made in its text which had the effect of narrowing the coverage of the Act and preventing it from being interpreted along the line advocated by the petitioner in this case.

Thus the first version of the Senate bill provided that the Act would apply to employees, any part of whose duty was the furtherance of interstate commerce or in any way affected interstate commerce. Thereafter, the Senate added the more restricted language "in any way directly or closely and substantially". A provision for the inclusion of "any employee . . . whose duties . . . shall be in any degree incidental" to interstate commerce was eliminated from the final bill. This Court has, on a number of occasions, given weight to deliberate changes that have been made during the course of the legislative process.[31] We submit that petitioner's argument is aimed at persuading the Court to interpret the Act as though it embodied the provisions of the bill in its early stages rather than those of the final enactment.

The legislative discussion of the 1939 Amendment in the House concerned itself with the problem of assumption of risk and no reference is made in the report to the question of coverage. This, in itself, indicates that the employees under consideration were those who were engaged

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31. See *Western U. T. Co. v. Lenroot*, 323 U. S. 490, 509 (1945).

in transportation or close to the instrumentalities of transportation. In the Report of the House of Representatives, Committee on Judiciary, 76th Congress, First Session, Report No. 1222 on H. R. 4988, referring to the assumption of risk provision, it is said (p. 5):

> "Manifestly, all that is sought to be done is to prevent the master from embarking upon a practice of negligence *with respect to the physical conditions upon and along the right-of-way.*" (Emphasis supplied.)

After the two houses of Congress had disagreed as to the exact terms of the Amendment a committee of conference met and recommended its adoption in the form in which it now stands. In relation to the coverage of the Act, their *entire* report is as follows (84 Congressional Record 11107):

> "The conferees agreed to a Senate provision not contained in the House amendment, *which is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.*
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it' (Shanks v. D. L. & W. R. R.)." (Emphasis supplied.)

2) *Comparison With Contemporary Legislation Involving the Commerce Power.*

This Court noted, prior to the adoption of the 1939 Amendment, that the Employers' Liability Act did not exhaust the limits of the congressional power under the commerce clause.[32] It seems equally clear that it was not the intention of Congress at the time of the Amendment to reach out to the limits of its power.

By 1939, decisions of this Court had made it relatively clear that the regulatory power of Congress under the commerce clause could embrace within it all the employees of employers who were engaged in interstate commerce regardless of the nature of the duties of the employee. In the National Labor Relations Act, Congress clearly expressed an intention to bring many employees formerly considered to be in intrastate commerce within the provisions of the Act and this Court sustained its action.[33]

That Congress was aware of its broad power to control interstate commerce and knew how to encompass a very wide area of employees when it was its intention to do so is also made evident by the Fair Labor Standards Act.[34]

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32. *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 477 (1914).

33. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). The National Labor Relations Act, Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, empowered the NLRB to prevent any person from engaging in any unfair labor practice "affecting commerce".

34. The Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, set forth the following definitions:

> "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 29 U. S. C. § 203(b).
>
> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods or in any process or occupation necessary to the production thereof, in any State." 29 U. S. C. § 203(j).

When it came to the 1939 Amendment of the F. E. L. A., Congress failed to indicate that all the employees of an interstate carrier, whether engaged in transportation or not, were intended to be made subject to the Act in order to accomplish its purpose. It likewise failed to define "commerce" in broader terms than "transportation" or to give any other indication that it intended to legislate to the limit of its power under the commerce clause. It thereby precluded a valid contention that it intended that employees whose duties were local in character and not connected with interstate transportation were brought within the coverage of the Act.

**E. The Federal and State Decisions Under the Amendment.**

The cases which have been decided since 1939 are in general harmony with an interpretation which credits the Amendment of Section 1 with no greater impact on the coverage of the Act than the elimination of the "moment of injury" rule. No cases have permitted a recovery if the employee did not fall within the three classes to which the Act had been applied prior to the Amendment, except the *Southern Pacific Co.* cases[35] now pending before this Court. A few cases have suggested that the language of the Amendment has broadened the Act's coverage beyond the mere elimination of the "moment of injury" rule but the pronouncements to that effect appear to be purely dicta. In the absence of any problem of the injured man's duties at the moment of the accident, the various types of railroad employees fared no differently before the Amendment than since in so far as coverage was concerned.

The only cases decided since the 1939 Amendment which have ignored the test of relationship to transporta-

35. *Southern Pacific Company v. Gileo; Southern Pacific Company v. Moreno; Southern Pacific Company v. Aranda; Southern Pacific Company v. Eufrazia; Southern Pacific Company v. Eelk*, certiorari granted Oct. 10, 1955, Docket No. 257.

tion are the five *Southern Pacific Co.* cases [36] in which this Court recently granted certiorari. These cases involved the construction of wheels, cars or yard retarders, which were instrumentalities of transportation even though not yet in transportation itself. The Supreme Court of California made no effort to explain why the *White* [37] and *Raymond* [38] cases were not controlling other than to refer to the "broad language added by the amendment in 1939". The rulings in the California cases have no real bearing on the case at bar since they merely involve the question of whether the "new construction doctrine" is still valid in cases arising under the F. E. L. A. They do not constitute a valid reason for the granting of certiorari in this case, as urged by petitioner in the first reason for granting the writ.[39]

But, parenthetically, we contend that the California cases were not correctly decided. As noted above,[40] the legislative history of the 1906 and 1908 Acts indicates that the proponent of the legislation did not believe that the Act would extend to shop employees. In several cases prior to 1939, this Court expressed its belief that shopmen were not within the provisions of the Act.[41] Such employees were

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36. See footnote 35, *supra*, p. 20.

37. *New York Central Railroad Co. v. White*, 243 U. S. 188 (1917).

38. *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43 (1917).

39. Petitioner's brief, page 5.

40. See footnote 18, *supra*, p. 8.

41. In *Industrial Commission v. Davis*, 259 U. S. 182 (1922); the Court said at page 187:

> "Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, indeed, are necessary to it, but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation

normally far removed from transportation and it was arguable whether they were exposed to the hazards of railroading.[42] The Court had ruled at an early stage, however, that those who worked to keep instrumentalities of transportation in repair were within the Act,[43] and a locomotive which was being serviced or repaired in a roundhouse or shop was an instrumentality that was quite as important to transportation as a bridge over the tracks. Consequently, when the Court dealt with the repair of locomotives, it barred recovery not because shopmen were not closely related to transportation but because *at the moment of injury* the engine was out of interstate service.[44] In the light of that background, the courts had no difficulty in concluding, after the Amendment, that shop repairmen were within the coverage of the Act.[45]

It is quite a different matter, however, to contend that employees who are engaged in shops devoted to new construction are within the Act. Prior to the Amendment, such employees had been ruled out, not because of the fact that the instrumentalities were not in interstate service at the time of the accident but because they were not instrumentalities of transportation at all.[46] Concepts of what is commerce and what affects commerce have doubtless changed since the decision in the *White* and *Raymond* cases, and in 1939 Congress might well have brought within the Act railroad employees engaged in manufacture. The defi-

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of the instrumentalities for a distinction between commerce and no commerce."

And see *N. Y., N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 419 (1932).

42. Of course, it can be said that when locomotives and cars are moved in and out of the shops for repairs, they move on tracks and the shop employees face the same risk of injury as do switchmen, for example.

43. *Pedersen v. D. L. & W.*, 229 U. S. 146 (1913).

44. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353 (1917).

45. *Edwards v. B. & O. R. Co.*, 131 F. 2d 366 (7th Cir. 1942).

46. *New York Central Railroad Co. v. White*, 243 U. S. 188 (1917); *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43 (1917).

nition of "produced" in the F. L. S. A.[47] presented one simple method of doing so. No such intention can be read into the language of the Amendment and its legislative history definitely rules it out. With all deference, we submit that the decisions of the Supreme Court of California in the backshop cases were based upon a misunderstanding of the scope of the Act and consequently amount to judicial legislation.

The case of *Lillie v. Thompson*, 332 U. S. 459 (1947), relied upon by petitioner in its second reason,[48] does not sustain the petition. In the first place, the Court did not pass on the issue of coverage;[49] and, secondly, her duties were "to receive and deliver messages to men operating trains in the yards" (page 461). That case graphically illustrates the difference between coverage and non-coverage by the Act. Lillie worked in direct contact with trains traveling on tracks; Mrs. Reed, petitioner in the case at bar, worked in an office building.

The petitioner's third reason[50] was an alleged conflict between the decision of the Third Circuit in the case at bar and *Straub v. Reading Co.*, 220 F. 2d 177 (3rd Cir. 1955). In *Straub*, the timekeeper's duties brought him on occasion to the cabs of the locomotives and he traveled from state to state. The necessary relationship to transportation was present though the Court labeled it a "borderline case", presumably because the claimant was a white collar worker with an office well away from the tracks.

The fourth reason[51] was a conflict between the decision below and *Thomas v. Union R. Co.*, 216 F. 2d 18 (6th Cir. 1954). The question of whether the plaintiff was within the F. E. L. A. does not appear to have been raised in the *Thomas* case and was not mentioned in the opinion. While petitioner apparently assumes that the plaintiff was a white

47. Quoted in footnote 34, *supra*, page 19.
48. Petitioner's brief, page 5.
49. See footnote to the decision at page 460.
50. Petitioner's brief, page 5.
51. Petitioner's brief, page 5.

collar worker, all that appears in the opinion was that plaintiff, a railroad employee, fell while "leaving his office and stepping from the porch thereof onto the concrete floor of a roundhouse" and that there was evidence of a dangerous condition "near the foreman's office, in the roundhouse" (page 19). On that meager information it would appear that Thomas' duties kept him in close proximity to the instrumentalities of transportation and that he was therefore within the coverage of the Act.

The fifth reason[52] cited three state cases involving claimants whose duties bear no close comparison with petitioner's. In *Ericksen*[53] plaintiff was a lumber inspector, whose job was to inspect lumber on the premises of lumber companies and accept or reject them for interstate shipment to the defendant. He was injured while inspecting ties that were being loaded into defendant's freight car standing alongside a dock. Plaintiff himself crossed state lines while performing his duties, as did the ties themselves. Ties are, of course, as much instrumentalities of transportation as rails, roadbeds and bridges. The *Harris*[54] case involved a shop employee who, among other things, took care of fires and firepans on locomotives engaged in interstate commerce and loaded oil for use on those locomotives. In *Jordan*[55] the injured employee had been, for many years, a carpenter whose work included the repair of bridges, water tanks, coal houses and stations. At the time of his injury he was enlarging a sewer used to carry off ashes, water and grease from pits in a roundhouse where interstate engines were serviced.

More in point is the decision of Judge Yankwich in *Holl v. Southern Pac. Co.*, 71 F. Supp. 21 (N. D. Cal. 1947),

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52. Petitioner's brief, page 6.

53. *Ericksen v. Southern Pacific Co.*, 39 Calif. 2d 374, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952).

54. *Harris v. Missouri Pac. R.*, 158 Kan. 679, 149 P. 2d 342 (1944).

55. *Jordan v. Baltimore and Ohio Railroad Company*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

in which the Court denied coverage to a clerk in a freight claim department. The Court there said at pages 23-24:

> "If she comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. And so, for that matter, does every other clerical employee in the department. I do not think that it was the intention of the Congress to include such employees and to withdraw them from the protection of State Employers' Liability Laws. On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in such commerce'*. This would have extended the Act to 'any person suffering injury while he is employed by such carrier,' and would have placed *all employees of interstate railroads under the Act*, whether their work be clerical or not, or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier*. This it could have done constitutionally even if it had included employees and activities clearly local and intrastate. [Citing cases].
>
> "But the Congress did not do so. And I do not find in the cases which have arisen under the amendment any judicial sanction for doing it by interpretation." (Emphasis by the Court.)

## CONCLUSION.

There is no basis for the granting of the petition for certiorari in this case and the writ should be denied.

Respectfully submitted,

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BRIEF ON MERITS

No. 621.

IN THE

# Supreme Court of the United States

October Term, 1955.

MARTHA C. REED,

*Petitioner,*

*v.*

PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

# BRIEF FOR THE RESPONDENT.

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## QUESTION PRESENTED.

Is a file clerk entitled to maintain an action for personal injuries under the provisions of the Federal Employers' Liability Act when it appears that her only duty on behalf of her employer, an interstate railroad, was to carry tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building?

## STATEMENT OF THE CASE.

This was an action for personal injuries brought under the Federal Employers' Liability Act. The pleadings consisted of a complaint and an answer, which admitted that respondent was an interstate carrier and that petitioner was its employee, but denied that petitioner was engaged in interstate commerce. After filing its answer, respondent took petitioner's deposition and answered interrogatories propounded by petitioner.

Chief Judge Kirkpatrick (United States District Court, Eastern District of Pennsylvania) granted respondent's motion to dismiss on the ground that petitioner's deposition and respondent's answers to interrogatories established that petitioner was not furthering interstate commerce or directly or closely and substantially affecting such commerce and that, therefore, her claim was not within the provisions of the Federal Employers' Liability Act. Since there was no diversity between the parties there was no other basis of federal jurisdiction. From the order of dismissal, petitioner appealed to the United States Court of Appeals for the Third Circuit which, in a well-reasoned opinion by Judge Goodrich, affirmed the decision of the District Court. Chief Judge Biggs dissented.

In her deposition, petitioner stated that the accident occurred during her lunch hour on July 19, 1951, when a wind and hail storm blew in a window and she was cut on the right arm (30a-35a).

She testified that for eight or nine years her job classification had been "print maker", her duties had been what she would call those of "a file clerk" and her work consisted exclusively of "filing" transparent prints in the office of the Mechanical Engineer on the fifth floor of respondent's 32nd Street Building in Philadelphia (22a, 23a, 24a). In elaborating upon the details of her job she described it as follows: she was handed an order to remove certain num-

bered papers from a filing cabinet; she removed the needed tracings from the file and gave them to a man in the blueprint department; when he completed his use of those papers, he returned them to her and she replaced them in the file cabinet; these were her only duties (23a, 27a, 28a, 29a, 30a, 54a).

The work of the department of the Mechanical Engineer included the preparation of blueprints from tracings of equipment used on all parts of respondent's railroad. The tracings were kept on file in that department and the blueprints made from the tracings were sent to all states through which the railroad operated its interstate system (19a, 20a, 23a, 27a, 29a). However, petitioner had nothing whatever to do with the preparation of the prints or with their distribution to other parts of the railroad system (54a).

## SUMMARY OF ARGUMENT.

Petitioner was not the type of employee who came within the definition of that term as it is used in the Federal Employers' Liability Act. Since the sole basis of federal jurisdiction in this case was the fact that it was brought under that Act, its obvious inapplicability left the District Court with no course other than to dismiss the proceeding.

The first Employers' Liability Act, enacted in 1906, was drafted in language broad enough to cover all employees of all employers engaged in the transportation industry. It was declared unconstitutional because it embraced a regulation of an employer-employee relationship which was beyond the realm of congressional power under the Constitution.

The second Employers' Liability Act of 1908 was framed to meet the constitutional limitations which had been laid down in the *Employers Liability Cases*. As interpreted by this Court, the second Act applied to railroad employees who were engaged in interstate *transportation* or in work so closely related thereto as to be practically a part of it. However, recovery was permitted under the Act only if the employee was engaged in interstate transportation at the very *moment of injury*.

By 1939 virtually all the states had adopted legislation compensating employees injured in intrastate commerce. Between the remedy provided by the federal statute and that afforded under state law, there had thus grown up a dual system for the adjudication of the rights of railroad employees who were injured or killed in the course of their employment. Between 1908 and 1939 the question of whether an employee was covered by the state or federal legislation was not based on the general character of his duties but rather on the nature of his work at the instant of his injury. If, at that moment, the employee was engaged in interstate transportation or work so closely

related thereto as to be practically a part thereof, he was entitled to the benefits of the federal legislation. If, at that instant, his activities were not connected with interstate transportation, his remedy was under the laws of the states. The remedies were mutually exclusive and many border-line cases arose involving employees who were uncertain as to the nature of the work they were engaged in at the "moment of injury". Where the injured employee chose the wrong forum, he often found that his claim in the other one had been barred by the statute of limitations.

To remedy the hardship presented by the so-called "border-line cases", the 1939 Amendment to the Employers' Liability Act provided that any employee, any part of whose duties was in furtherance of interstate commerce or any part of whose duties directly or closely and substantially affected such commerce, was entitled to the remedies of the Act. This change in language was intended only to abolish the "moment of injury" rule. Its purpose was not to bring all railroad employees within the scope of the federal legislation to the exclusion of remedies provided by the states but rather to provide for the inclusion within the Act of all employees who were engaged in interstate transportation even though some of their duties might be intrastate in nature.

The proof of the fact that the 1939 Amendment was intended to enlarge the scope of the Act only to a limited extent rather than to embrace all railroad employees and supplant the state remedies can be clearly demonstrated:

1. The 1908 Act had been consistently interpreted as applying only to those employees who faced the hazards that were peculiar to the railroad industry, and the historical development of the legislation made it clear that Congress in 1939 had no intention of changing the basic concept of the Act.

2. The legislative history of the Amendment shows that Congress was concerned with the elimination of the

"moment of injury" rule and not with a general broadening of the Act which would bring all employees within its coverage.

3. The Amendment involved a re-enactment of the original Section 1 of the 1908 Act and that carried with it the gloss of this Court's construction that the Act was solely concerned with employees connected with transportation.

4. The wording of the new paragraph added to Section 1 by the 1939 Amendment shows clearly that the elimination of the "moment of injury" rule was the sole matter with which Congress was concerned.

5. A comparison of the Amendment with the language of earlier and contemporary legislation involving the commerce power shows that Congress would have used broader language had it intended to bring all railroad employees within the Act.

6. The interpretation of the Amendment by this Court and the lower Federal and State courts for a period of seventeen years indicates that the Act was not intended to make the FELA the exclusive remedy for all injured railroad employees and only the same general classes of employees who were within the coverage of the Act prior to the Amendment have been permitted to recover since its passage.

## ARGUMENT.

### Introduction.

Petitioner's right to recovery depended on proof that she was the type of employee embraced within the coverage of the Federal Employers' Liability Act. In the absence of diversity of citizenship there was no other basis for federal jurisdiction. Thus the validity of the action of the Court below in dismissing this proceeding depends entirely on whether petitioner is within the scope of the Act.

The applicability of the statute to a particular employee is governed by Section 1. That section is composed of two paragraphs, the first having been enacted in 1908[1] and re-enacted in 1939, and the second being added by the 1939 Amendment.[2] Eliminating non-essentials, the section reads as follows:

> "Every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of . . . employees of such carrier, or by reason of any defect . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

1. Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U. S. C. § 51.
2. Act of August 11, 1939, c. 685, 53 Stat. 1404, 45 U. S. C. § 51.

The petitioner claims that the 1939 Amendment brings within the scope of its provisions virtually all employees of a railroad engaged in interstate commerce and Chief Judge Biggs, in his dissenting opinion, apparently accepted that view. It is the contention of the respondent, and the majority of the Third Circuit so ruled, that the Amendment had no such effect and that its meaning could not be stretched to include an employee whose duties were as remote from interstate commerce as were those of petitioner.

Thus, the issue involves solely a matter of statutory construction, and, in the light of the interpretation which has been consistently given to the Act by this Court over a period of forty-eight years, there can be no real ambiguity with regard to its coverage as set forth in its first section. An understanding of the section as a whole can only be attained by examining, first, the meaning of the original paragraph as established by this Court in many decisions between the adoption of the Act in 1908 and its Amendment in 1939, and, secondly, by seeking the intention of Congress as expressed in the second paragraph, which was added by the Amendment.

## A. The Scope of the Employers' Liability Act Prior to the 1939 Amendment.

The first Employers' Liability Act of 1906[3] had been declared unconstitutional shortly before the passage of the second Act. Congress was determined that the 1908 Act should escape the fate of the Act of 1906 and hence the framework of the later Act was blocked out with this Court's opinion in *The Employers' Liability Cases*, 207 U. S. 463 (1908) very much in the congressional mind. The scope of the earlier Act and the reason for its invalidation had been summarized in the following sentence from that opinion (page 498):

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3. Act of June 11, 1906, c. 3073, 34 Stat. 232.

> "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employés, without qualification or restriction as to the business in which the carriers or their employés may be engaged at the time of injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

In the light of that opinion, Congress narrowed the scope of the coverage of the Act of 1908 and in Section 1 expressly limited recovery to injuries suffered by the employee "while he is employed by such carrier in such commerce".

In interpreting the 1908 Act, this Court established two basic principles which, up to 1939, furnished the determining factors in all decisions involving the coverage of the Act. In the first place, the Court declared that the word "commerce" as used in the Act meant "transportation" and hence the section should read as though it limited recovery to injuries suffered by an employee "while he is employed by such carrier in interstate transportation".[4] In addition, the Court said that the Act required a finding that the employee was engaged in interstate transportation at the "moment of injury". Thus, in its approach to each case the Court did not look at the general nature of the duties of the employee who was injured but concerned itself only with the character of the *transportation* in which the employee was engaged *at the moment of injury*. If the transportation or instrumentality of transportation was interstate at that instant, he was covered by the federal statute; if it was not, his remedy was under state law.[5]

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4. The word "commerce" in the first line of the Act should also be read as though it were "transportation". Thus, the Act applied only to "every common carrier by railroad while engaging in interstate transportation".

5. *New York Central R. R. v. Winfield*, 244 U. S. 147 (1917).

Three cases set the basic pattern.

*Pedersen v. D. L. & W.*, 229 U. S. 146 (1913) prescribed that the work of the injured employee must have close proximity to the interstate commerce upon which the recovery would depend. There a carpenter, whose duty it was to repair a bridge which carried interstate traffic, was injured while carrying some bolts and rivets to the bridge. Recovery was based on the fact that the bridge was an "instrumentality of interstate commerce" and the work was "so closely connected therewith as to be a part of it" (page 151).

In *Illinois Central v. Behrens*, 233 U. S. 473 (1914), the "moment of injury" test was formulated. The deceased, a member of a switching crew, handled interstate and intrastate trains indiscriminately. He was killed while moving an intrastate train and recovery under the federal law was denied for that reason.

*Shanks v. D. L. & W.*, 239 U. S. 556 (1916) involved a car repairman who, when he was hurt, was moving a countershaft used to carry power to machinery. In denying coverage under the federal act, the Court made clear that recovery depended on employment in interstate *transportation*, saying at page 558:

> "the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

That test was applied again and again[6] and, after fifteen years, in *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74 (1931), the Court said at page 79:

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6. In two cases, *Erie R. R. v. Collins*, 253 U. S. 77 (1920), and *Erie R. R. v. Szary*, 253 U. S. 86 (1920), this Court departed from the rule of the *Shanks* case. In *Chicago & E. I. R. R. v. Com.*, 284 U. S. 296 (1932), those cases were expressly overruled for that reason.

"'Since the decision in the *Shanks* case, the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated."

In the thirty-one years during which cases involving injuries to railroad employees were brought to this Court, prior to the 1939 Amendment, three clearly defined classes of employees were found to be within the scope of the Act. It is important that those classes be carefully noted because when, in the last section of this brief, an examination is made of the types of employees who have been permitted to recover since the adoption of the Amendment, it will be seen that precisely the same classes have been granted recovery after 1939 as prior thereto. Those employees may be classified[7] as follows:

(a) those engaged in train movements (the train crews),[8]

(b) those whose duties were directly connected with that movement (switchmen, signalmen, crossing watchmen and yard employees),[9] and

(c) those whose work was closely related to keeping the instrumentalities of interstate transportation in a proper state of repair (maintenance workers and repairmen).[10]

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7. For a substantially similar classification of the employees within the Act prior to the 1939 Amendment, see Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), page 1370.

8. *North Carolina R. R. v. Zachary*, 232 U. S. 248 (1913) (fireman); *New York Central R. R. v. Carr*, 238 U. S. 260 (1915) (brakeman); *Erie R. R. v. Welsh*, 242 U. S. 303 (1916) (conductor).

9. *Norfolk & Western R. R. v. Earnest*, 229 U. S. 114 (1913) (switchman); *Pecos v. Northern Texas R. R.*, 240 U. S. 439 (1916) (yard clerk); *Southern Pacific R. R. v. Industrial Accident Commission*, 251 U. S. 259 (1920) (electric lineman).

10. *Walsh v. N. Y., N. H. & H. R. R.*, 223 U. S. 1 (1912) (car repairman); *Pedersen v. D. L. & W. R. R.*, 229 U. S. 146 (1913) (bridge repairman); *Southern Ry. v. Puckett*, 244 U. S. 571 (1917) (track clearer).

The opinions of this Court reflect a frank recognition of the fact that the purpose of the Act was to provide a special remedy for those railroad employees who faced the special hazards of railroading.[11] The decisions confined recovery to those who were actually engaged in transportation or those who, generally speaking, were in close physical and practical proximity to the instrumentalities of transportation, the "cars, engines, machinery, track, roadbed, works, boats, wharves or other equipment", which were specifically mentioned in Section 1 of the Act. Where there was physical proximity to interstate transportation or its instrumentalities, the Court found the necessary close relationship to transportation which made the work of the employee "in practice and in legal contemplation a part of it".[12] And conversely, those whose duties did not bring

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11. The philosophy underlying the Act was that which had inspired earlier railroad legislation in England, continental countries and some of the states. See Reports of House Judiciary Committee, dated March 15, 1906, Report No. 2335 (1906 Act), and April 4, 1908, Report No. 1386 (1908 Act). In report No. 2335 it was said at page 2:

> "In 1888 England passed an act which abolished the doctrine of fellow-servant with reference *to the operation of railroad trains*, and in 1897 it extended this law to apply to many of the *hazardous employments of the country.*" (Emphasis supplied.)

In reporting on the 1906 Act, Representative Sterling said, 40 Congressional Record 4602:

> "I think it would apply to trainmen, switchmen, men in the roundhouse that have charge of the engines, and any other employees whose duty relates to or is connected with the business of carrying commerce, but I do not believe it would go any further than that."

The House report on the 1908 Act was substantially similar to that accompanying the 1906 Act. A review of the entire legislative history of both Acts (and the 1939 Amendment as well) reveals that many examples were given as to the type of employee for whose benefit the legislation was intended. Not one employee is referred to outside the field of those exposed to the hazards peculiar to train transportation.

12. *Pedersen v. D. L. & W. R. R.*, 229 U. S. 146, 151 (1913); *Shanks v. Del. L. & W. R. R.*, 239 U. S. 556, 558 (1915); *Kinzell v. Chicago M. & St. P. Ry.*, 250 U. S. 130, 133 (1919); *So.*

them into physical proximity to such transportation or its instrumentalities were said to be without the scope of the Federal Act and within the coverage of the state laws. Clerical workers, for example, whose duties confined them to the sanctuary of the upper floors of an office building, faced no hazards peculiar to the railroad industry since their duties did not bring them into proximity with any of the instrumentalities of transportation. This Court twice stated that such employees were outside the coverage of the Act.[13] It will be seen that there was no provision in the 1939 Amendment which would change this basic conception of the scope and purpose of the Act and that the decisions after 1939 have been wholly consistent with the earlier view.[14]

To summarize: Congress, when it enacted the Act of 1908, had no intention of including all employees within its provisions. The remedies of the Act were made available only to those who were engaged in interstate commerce. And under the decisions of this Court they had to be engaged in interstate *transportation* at the very *moment of injury.* The Court afforded the remedy to employees who were engaged in train movements and those who performed closely related work and faced the hazards of "railroading". In order to recover, however, these employees had to establish not only that they were normally engaged in interstate transportation but that they were so engaged at the moment when they received their injuries.

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*Pacific R. R. v. Commission*, 251 U. S. 259, 263 (1910); *Chicago & N. W. Ry. v. Bolle*, 284 U. S. 74, 78 (1931); *New York, N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 420 (1932).

13. *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1922); *N. Y., N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 419 (1932).

14. In cases since the 1939 Amendment the purpose of the Act as it affects those engaged in "railroading" has frequently been recognized. See for example *Bailey v. Central Vermont R. R.*, 319 U. S. 350, 354 (1943) and the comments of Mr. Justice Frankfurter in his dissenting opinion in *Stone v. N. Y. C. & St. L. R. R.*, 344 U. S. 407, 410 (1953).

## B. The Interpretation of the 1939 Amendment.

### 1. The Problems It Was Intended to Solve.

The language of the Amendment is best understood when it is read in the light of the evils it was intended to remedy and the jurisdictional situation as it existed in 1939. There were two major defenses which employees continually encountered in suits brought under the 1908 Act, namely the "moment of injury" rule and the doctrine of assumption of risk. The latter did not present a difficult problem for it was easy to abolish the defense *in toto*. However, the question of coverage, which had been presented in as many as 43 cases coming before this Court between 1908 and 1933,[15] was much more difficult to solve.

It should be remembered that the 1908 Act permitted recovery to employees who were engaged in interstate transportation but only if they were so engaged at the time of their injuries. By the time Congress undertook to amend the Act in 1939, all but two of the states had enacted workmen's compensation laws or state employers' liability acts,[16] and those railroad employees who sustained injuries while engaged in intrastate activities found redress under state legislation. Remedies were therefore available for all railroad employees but difficulties arose when an employee, at the instant of his injury, was engaged in some activity not clearly definable as interstate or intrastate.

The problem faced by Congress in 1939 was not merely a jurisdictional conflict between federal and state power. It likewise involved a question of the desirability of two different types of remedy. State compensation was available irrespective of fault; the Federal Act required proof

15. See Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 Harvard L. Rev. 389, 397-398 (1934), reviewing the cases.

16. Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-1940*, at pages 27-28 (1947).

of negligence.[17] Notwithstanding the fact that the measure of recovery under the Federal Act was likely to be greater, in numerous cases both before and after 1939 the borderline employees sought recovery under state acts.[18] Undoubtedly many of these claimants were motivated by their desire to secure speedy and sure relief and their uncertainty about negligence. Congress was not unaware of the social undesirability of requiring all railroad employees to prove negligence in order to recover and to face the uncertainty, delay and expense of a jury trial.[19]

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17. *Wilkerson v. McCarthy*, 336 U. S. 53, 61; 65, 68 (1949).

18. Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-1940*, pages 107, 119, 124, 134 (1947).

19. A report was made in 1947 by the Railroad Retirement Board to the Senate Committee on Interstate and Foreign Commerce pursuant to Senate Resolution 128, 77th Congress (1941) on the incidence of work injuries in the railroad industry, their cost, and social and economic consequences. This report dealt with injuries incurred in 12 selected months of 1938-1940 (page 6). It strongly bears out the wisdom of Congress in its determination in 1939 not to bring clerical and other local employees within the provisions of the Act. The Board found that in the 1938-1940 period of the study only two out of the 49 state jurisdictions (including the District of Columbia) had no form of compensation system in operation (page 27) and 71% of the cases not brought under federal legislation were workmen's compensation cases (page 29); that the frequency rate of injury to trainmen was 28.6 (injuries per million man hours worked) compared to 2.4 in the case of supervisory, clerical and other non-manual employees, while the severity rate (days lost per thousand man hours worked) was 8.6 for the trainmen as compared to 0.5 for the clerical (page 11); that the majority of clerical employee injuries consisted of temporary total disabilities of 4 or more days (Appendix C; Table C-3) for which an employee was compensated more adequately under workmen's compensation (page 135); and that the great delays in securing payments made the FELA compare unfavorably with the compensation system (page 14). The over-all tenor of the report, which impliedly favored the establishment of a federal compensation act (page 187 et seq.), is that the non-operating personnel fare much better under the state laws than under the FELA. The Board reaffirmed (page 145) the earlier conclusion of the study made by the Federal Coordinator of Transportation:

> "The railroad-accident compensation system takes on many aspects of a lottery from which a few employees draw large sums but from which many receive insufficient awards."

Three possible solutions were available: (1) enactment of a federal compensation act for all railroad employees, (2) extension of coverage of the FELA to all railroad employees or (3) elimination of the "moment of injury" test and extension of coverage to border-line employees.

From 1912 to 1935 Congress had constantly had before it the possible enactment of a federal compensation act covering all railroad employees. In 1912 such an act was passed by both the Senate and the House but the minor discrepancies between the two bills were never reconciled.[20] In the 1930's similar legislation covering all railroad employees and patterned after the Longshoremen's & Harbor Workers' Compensation Act [21] was also considered.[22] Notwithstanding considerable support, this legislative cure was never successfully accomplished.[23]

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20. See S. 5382, 62d Cong., 2d Sess., 48 Cong. Rec. 5923-5959 (1912), 49 Cong. Rec. 4476-4547 (1913), 49 Cong. Rec. 4562-4563, 4676-4677 (1913).

21. Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901.

22. See S. 4927, 72d Cong., 1st Sess., 75 Cong. Rec. 13760 (1932); S. 5695, 72d Cong., 2d Sess., 76 Cong. Rec. 5069 (1933); S. 1320, 73d Cong., 1st Sess., 77 Cong. Rec. 1624 (1933); S. 3630, 73d Cong., 2d Sess., 78 Cong. Rec. 8982 (1934); S. 3152, 74th Cong., 1st Sess., 79 Cong. Rec. 10029 (1935).

23. See, Rubinow, *Accident Compensation for Federal Employees*, 2 American Labor Legislation Review 29 (1912); Andrews, *Interstate Compensation for Transportation Workers*, 25 American Labor Legislation Review 169 (1935); Richberg, *Advantages of a Federal Compensation Act for Railway Employees*, 21 American Labor Legislation Review 401 (1931); Wagner, *Federal Workmen's Compensation for Transportation Workers*, 26 American Labor Legislation Review 15 (1936); *The Railroad Industry and Work-Incurred Disabilities*, 36 Cornell L. Q. 203 (1951); Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 Harvard L. Rev. 389 (1934); Albertsworth and Cilella, *A Proposed "New Deal" for Interstate Railway Harms*, 28 Illinois L. Rev. 587 and 774 (1934); *Symposium on the Federal Employers' Liability Act*, 18 Law and Contemporary Problems 107 (1953); Miller, *Workmen's Compensation for Railroad Employees*, 2 Loyola L. Rev. 138 (1944); Gelhorn, *Federal Workmen's Compensation for Transportation Workers*, 43 Yale L. J. 906 (1934); Railroad Retirement Board, *Work Injuries in the Railroad Industry, 1938-1940* (1947).

There is no evidence that Congress at any time intended to impose the FELA on non-transportation railroad workers. That would have required them to establish negligence in order to recover lost wages and medical expenses, a necessity which has caused the FELA to be characterized as "archaic".[24] No possible justification has been suggested for a different treatment for railroad clerical workers than that provided by the states for office workers in any other form of business. They should share the protection of legislation enacted for the benefit of all in the community.

It is clear that Congress in the 1939 Amendment intended only to eliminate the confusion resulting from the border line cases and adopted the third solution set forth above: the repeal of the "moment of injury" rule and its replacement by a test involving the general nature of the employees' duties. It will be seen that the effect of this test was to bring all transportation workers within the federal remedy and leave all other employees where they were before.

Finally, there is no evidence of any kind, within the language of the Amendment or in its legislative history, that Congress intended to break down the dual system of federal and state remedies which had been created by 1939 for the benefit of all injured railroad employees. It sought only to protect the rights of the "border-line" employees whose duties carried them back and forth between inter-

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24. ". . . archaic and unjust as a means of compensation," Justice Frankfurter concurring in *Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54, 71 (1943); ". . . crude, archaic and expensive as compared with the more modern systems of workmen's compensation," Justice Douglas in *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354 (1943).

"This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws." Justice Frankfurter concurring in *Wilkerson v. McCarthy*, 336 U. S. 53, 65 (1949).

state and intrastate transportation and who frequently had difficulty in establishing or ascertaining the nature of that transportation at the time of the accident.[25]

2. The Legislative History.

Its legislative history established beyond the possibility of contravention that the Amendment of Section 1 had no purpose other than the abolition of the "moment of injury" rule.

At the outset, it should be observed that a study of the entire legislative history of the Act of 1906, the Act of 1908 and the 1939 Amendment, reveals that many illustrations were given of employees intended to be encompassed by the federal legislation. There is not a single reference at any stage of any one of the three pieces of legislation to an employee who was not exposed to the hazards peculiar to the railroad industry. The legislative history of the 1939 Amendment, particularly, makes it clear that Congress intended to deal only with employees who were engaged in "railroading", i.e. transportation activities.

25. The following are examples of the types of cases presenting the evil which Congress intended to cure:

*Ill. Central R. R. v. Behrens*, 233 U. S. 473 (1914) (Crewman on switch engine handled "interstate and intrastate traffic indiscriminately"; handling only intrastate when injured); *Shanks v. Delaware, Lack. & West. R. R.*, 239 U. S. 556 (1916) (Locomotive repairman who, on the day of injury, was engaged in installing a heavy shop fixture); *Illinois Central R. R. v. Peery*, 242 U. S. 292 (1916) (Northbound run usually carried interstate freight, but, southbound, on which injury occurred, carried intrastate freight only); *Erie R. R. v. Welsh*, 242 U. S. 303 (1916) (Yard conductor injured while going to pick up order to make up interstate train); *Industrial Accident Commission v. Davis*, 259 U. S. 182 (1922) (Repairman not engaged in interstate commerce because the interstate engine on which he was working when injured had been removed therefrom 68 days); *New York, New Haven & Hartford R. R. v. Bezue*, 284 U. S. 415 (1932) (Plaintiff injured while working on a dead engine out of interstate commerce 12 days for heavy repairs); and *Chicago & Northwestern R. R. v. Bolle*, 284 U. S. 74 (1931) (Usually fired interstate engines but plaintiff, at time of injury, was firing an engine used to heat station facilities).

At the hearings of the Subcommittee of the Committee on the Judiciary of the Senate, 76th Congress, 1st Session, § 1708, March 28-29, 1939, T. J. McGrath,[26] General Counsel for the Brotherhood of Railroad Trainmen, who was the principal witness to advocate the adoption of the Amendment, made clear that it was not intended to go beyond the transportation employees already covered by the Act. He said, at pages 4 and 8:

> "The amendment of 1908 was intended to and did restrict the application of the act to employees of common carriers by railroad who were injured while the employees themselves were engaged in interstate commerce. The Court, in interpreting that section, clarified it to that extent, and perhaps it might be said they limited its application by *defining interstate commerce as being transportation in interstate commerce, so that the law really applies to train and enginemen while engaged in moving interstate commerce over the road and to other employees whose work is incidental to that sort of thing, men working in roundhouses, loading cars in interstate commerce, and so forth.*
>
> . . . . .
>
> "Now if this amendment that we propose is put into the act it will, to a very large extent, wipe out the obscurity and the difficulty that now exists in attempting to determine when a man is or is not engaged in interstate commerce. *Its application will be confined, of course, to the character of employees now covered by the present act . . .*" (Emphasis supplied.)

Senate Report No. 661, 76th Congress, First Session, June 22, 1939 (pp. 2-3) illustrates quite clearly that the

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26. Despite Mr. McGrath's modest statement of the study which he had given to the 1939 Amendment (Brief for Petitioner, p. 8) he referred by name to most of the cases which we have listed in the immediately preceding footnote.

broadened scope of coverage was intended to eliminate only the "moment of injury" test in both its troublesome aspects; i.e., what was the injured employee doing and for what purpose was the equipment on which he was working being used at the instant of his injury:

> "In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce; or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.
>
> * * *
>
> "Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce.
>
> * * *
>
> "*The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic*" (emphasis supplied).

Furthermore, prior to the passage of the Senate bill, changes were made in its text which had the effect of narrowing the coverage of the Act and preventing it from being interpreted in the manner advocated by the petitioner in this case.

Thus the first version of the Senate bill provided coverage for:

> "Any employee of a carrier any portion of whose duties as such employee shall be the furtherance of or

> in any way affecting interstate or foreign commerce as above set forth, or whose duties as such employee shall be in any degree incidental thereto."[27]

Thereafter, the Senate substituted the more restricted language, "in any way directly or closely and substantially".

This Court has, on a number of occasions, given weight to deliberate changes that have been made during the course of the legislative process.[28] We submit that petitioner's argument is aimed at persuading the Court to interpret the Act as though it embodied the provisions of the bill in its early stages rather than those of the final enactment.

The legislative discussion of the 1939 Amendment in the House concerned itself with the problem of assumption of risk and no reference is made in its report to the question of coverage. The employees with whom the House was concerned were those who were engaged in transportation or in work close to the instrumentalities of transportation, and assumption of risk, of course, presented no problem in so far as clerical workers were concerned. In the Report of the House of Representatives, Committee on Judiciary, 76th Congress, First Session, Report No. 1222 on H. R. 4988, referring to the assumption of risk provision, it is said (p. 5):

> "Manifestly, all that is sought to be done is to prevent the master from embarking upon a practice of negligence *with respect to the physical conditions upon and along the right-of-way.*" (Emphasis supplied.)

Since the House made no suggestion at all to alter the coverage of the Act, it is vain to attribute to it an intention to revolutionize the coverage.

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27. Hearings of the Subcommittee of the Committee on the Judiciary of the Senate, 76th Congress, 1st Session, § 1708, March 29, 1939, p. 2.

28. See *Western U. T. Co. v. Lenroot*, 323 U. S. 490, 509 (1945); *Penna. R. R. v. International Coal Co.*, 230 U. S. 184, 198 (1913); *Carey v. Donohue*, 240 U. S. 430, 436, 437 (1915).

After the two houses of Congress had disagreed as to the exact terms of the Amendment, a committee of conference met and recommended its adoption in the form in which it now stands. In relation to the coverage of the Act, their *entire* report is as follows (84 Congressional Record 11107):

> "The conferees agreed to a Senate provision, not contained in the House amendment, which is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers *who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.*
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it' (Shanks v. D., L. & W. R. R.)." (Emphasis supplied.)

Thus the Amendment, as well as the original Act, was entirely directed toward providing a remedy for workers in interstate transportation, and the only change insofar as coverage was concerned was to continue the protection of the federal remedy to such workers when they were "temporarily divorced therefrom and engaged in intrastate operations". Under no stretch of the imagination could Mrs. Reed be described as an employee "ordinarily engaged in the transportation of interstate commerce" who was, "at the time of injury, temporarily divorced therefrom and engaged in intrastate operations".

3. The First Paragraph of the Amended Section 1.

The petitioner would have the Court decide this case by a mere application of a phrase or two which may be selected from the second paragraph of Section 1. The context, the thirty-one years of the Act's history, and the actual congressional intent are ignored. Above all, petitioner has overlooked the fact that Section 1 of the Act has two paragraphs, that the first stands exactly as it did in the Act of 1908, that it was given a "warp and woof" by many decisions of this Court prior to 1939, and that Congress, in reenacting that paragraph when it amended the Act, must be deemed to have intended to preserve the "gloss of its construction" by this Court. Furthermore, since the two paragraphs are closely tied together, the second cannot be construed in such a way as to disregard the existence and meaning of the first. (Petitioner did not so much as cite the first paragraph in setting forth "The Stat[u]te Involved", Brief for the Petitioner, page 3.)

Again and again, Congress has reenacted portions of a statute which had been the subject of judicial interpretation and this Court, in construing the later enactment, has found that it carried with it the construction which had been given to the earlier legislation. The addition of new provisions modifies those which are retained and the gloss of their construction only to the extent that Congress has exhibited an intention to accomplish such a change. *U. S. v. Ryan*, 284 U. S. 167, 175 (1931); *Missouri v. Ross*, 299 U. S. 72, 75 (1936); *Francis v. Southern Pacific Co.*, 333 U. S. 445, 450 (1948); and see Appendix B to the dissenting opinion of Mr. Justice Frankfurter in *Commissioner v. Estate of Church*, 335 U. S. 632, 690 (1949).

In the 1939 Amendment, Congress has expressed its purpose in terms that admit of no doubt. The reenactment of the original paragraph confirms what is learned from the historical development of the Act and its legislative history. It shows conclusively that Congress was still concerned

about railroad employees who were engaged in interstate transportation and that the sole purpose of the Amendment, in so far as Section 1 was concerned, was to remove the "moment of injury" rule from the Act. The retention of the first paragraph was a clear indication that the word "commerce" was still to be taken as meaning "transportation" and the adherence to *interstate* transportation indicated Congress' continuing preoccupation with the plight of those employees who, traditionally, had been embraced within the field of federal regulation. The reenactment of that paragraph also demonstrated the absence of any intention to bring within the coverage of the Act the great mass of railroad employees who were engaged in intrastate or local activities.

4. The Second Paragraph of the Amended Section 1.

An examination of the key clauses and phrases of the paragraph added by the 1939 Amendment demonstrates that their obvious meaning supports the construction contended for by respondent. The words in question are "commerce", "any part of whose duties", the "furtherance" clause, the "directly" clause and the "closely and substantially" clause.

*"Interstate or foreign commerce . . . such commerce as above set forth".*

As heretofore pointed out, this court had interpreted the word "commerce" as used in the Employers' Liability Act to mean "transportation". In using the same term in the amendatory paragraph without giving it a new definition, Congress must be presumed to have intended it to have the same meaning that this Court had so consistently given it prior to 1939. Thus, no basic change in the scope of applicability was intended; the remedy was to continue as one designed for employees engaged in interstate transportation. The avowed purpose of eliminating the "moment of

injury" rule bears out this construction, for the employees whose claims had been barred because of the application of that rule were all employees normally engaged in transportation. The same was true of those who had been barred by assumption of risk. No one would seriously contend that the abolition of these two defenses was designed for the benefit of non-operating, white-collar employees.

### *"Any part of whose duties."*

It should be noted that the two clauses which are said by petitioner to "open up" the Act to all railroad employees (i.e. the "furtherance" clause and the "directly or closely and substantially" clause) have for their subject the phrase "any part of whose duties". It is apparent from a reading of the Amendment that that phrase is its very crux. By its terms, the test of inclusion within the Act was transformed from the old one of duties at the time of the accident to a test of duties in general. On the one hand, therefore, his phrase indicates the clear purpose of Congress to eliminate the "moment of injury" rule.[29] In addi-

29. It should be remembered that the rule eliminated two groups of employees: those who were generally engaged in interstate commerce but were in intrastate at the time of the accident, and those who performed work on equipment which was normally used in interstate commerce but which had been withdrawn from such commerce at the time of the injury. *Illinois Central R. R. v. Behrens*, 233 U. S. 473 (1914), in which a member of a switching crew happened to be moving intrastate cars when he was killed, illustrates the first group; *Minneapolis & St. L. R. R. v. Winters*, 242 U. S. 353 (1917), in which plaintiff was injured while repairing a locomotive used in interstate commerce both before and after the accident, is an example of the second. Obviously, the scope of the coverage of the Act was very materially widened when these employees were brought within the Act.

The double aspect of the problem of the "moment of injury" rule was described in *Baird v. N. Y. C. R. R.*, 229 N. Y. 213, 86 N. E. 2d 567 (1949), at page 569, as follows:

> "But the new 1939 language cannot, of course, be read off by itself. We know, from the decisions above cited and many others, that the amendment was enacted in the light of two

tion, it precludes a rational argument that all employees were intended to be brought within the Act by these clauses. Provision for the inclusion within the Act of an employee "any part of whose duties" affects commerce in a specific way, necessarily implies recognition of the fact that there are other employees no part of whose duties may have such effect. Petitioner in this case is just such a person.

*The "furtherance" clause.*

The amendatory paragraph covers in effect three different groups of employees. The "furtherance" clause, which covers the first group, reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce . . . shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce . . . ."

The meaning of the words "furtherance of commerce" is perfectly clear if for "commerce" one substitutes "transportation", the word which this Court had established that it meant when it appeared in this Act. "Furtherance" when applied to transportation was intended to mean "movement" in the physical sense, and by this clause Congress sought to keep within the scope of the Act all transportation employees (i.e. the crews of trains) regardless of their activities at the moment of the accident.[30] If "fur-

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limiting rules of the cases: one, the so-called 'pin-point rule' forbidding recovery unless the work was interstate transportation or very closely connected therewith at the very time of the accident, and, second, the so-called 'back shop' rule which said that 'dead engines' in the course of repair were not instrumentalities of interstate transportation."

30. The words "furtherance" and "furthering" were used in that general sense prior to the adoption of the Amendment. Thus in Roberts, II *Federal Liabilities of Carriers* (2nd ed. 1929), it was said:

> "a fireman on duty on a train carrying freight from one state into another is engaged in interstate commerce because he is

therance" is given a meaning broad enough to embrace every employee of a railroad carrier, the remainder of the paragraph is redundant and without sensible meaning. *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208 (1932); *McDonald v. Thompson*, 305 U. S. 263, 266 (1938); *Singer v. U. S.*, 323 U. S. 338, 344 (1945).

*The "directly" clause.*

This covers a second group of employees who are brought within the coverage of the Act. The clause reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee . . . shall, in any way directly . . . affect such commerce as above set forth shall for the purposes of this chapter, be considered as being employed by such carrier, in such commerce . . ."

As pointed out above, at page 11 *supra*, the decisions of this Court prior to the Amendment did not confine recovery to those who were actively moving trains in interstate transportation. It also included those whose duties were "connected with that movement, not indirectly or remotely, but

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actually furthering the movement of interstate traffic." (page 1372)

"For like reasons trainmen on such trains are furthering interstate transportation and hence subject to the Federal Employers' Liability Act while picking up, at stations en route, cars to be included in the train and carried forward, regardless of whether such cars are themselves interstate or local in character." (page 1418)

"The rule to be deduced from the foregoing cases would seem to be that if, in connection with a switching operation, any interstate purpose is intended or accomplished, the movement as a whole is in furtherance of interstate transportation; . . ." (page 1432)

See also *Erie R. R. v. Welsh*, 242 U. S. 303, 306 (1916); *Murray v. Pittsburgh R. R.*, 263 Pa. 398, 401, 107 Atl. 21 (1919); *Hines v. Wicks*, 220 S. W. 581 (Tex. App. 1920).

*directly* and immediately"[31] (emphasis supplied)—these being, in general, the switchmen, signalmen, yard and station personnel. The "directly" clause, therefore, kept within the coverage of the Act the members of that group of employees regardless of their activities at the moment of injury.

*The "closely and substantially" clause.*

Here again, a group of employees is brought within the Act irrespective of their activities at the time of the accident. The clause reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee . . . shall, in any way . . . . closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce . . . ."

It was pointed out, at page 11 *supra*, that in addition to those employees who moved the instrumentalities of interstate transportation (the train crews) and those who were directly connected with the movement (the switchmen and yard personnel), there was a third class of employees (maintenance and repairmen) who, prior to the 1939 Amendment, had been held to be within the scope of the Act on the ground that their "work of keeping . . . instrumentalities of interstate transportation in a proper state of repair . . . (was) so *closely* related to such commerce as to be in practice and in legal contemplation a part of it"[32] (emphasis supplied). Such employees are further

31. *St. Louis, San Francisco Ry. v. Seale*, 229 U. S. 156, 161 (1913); *N. Y. Central R. R. v. Carr*, 238 U. S. 260, 264 (1915); *Erie R. R. v. Welsh*, 242 U. S. 303, 306 (1916).

32. *Pedersen v. D. L. & W. R. R.*, 229 U. S. 146, 151 (1913); *Shanks v. Del. L. & W. R. R.*, 239 U. S. 556, 558 (1915); *Kinzell v. Chicago, M. & St. P. Ry.*, 250 U. S. 130, 133 (1919); *So. Pacific R. R. v. Commission*, 251 U. S. 259, 263 (1920); *Chicago & N. W. Ry. v. Bolle*, 284 U. S. 74, 78 (1931); *New York, N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 420 (1931).

away from transportation than the train crews and the track and yard personnel of the first and second groups but closer to it than those whose duties are purely local or intrastate in character or do not involve any interstate activity whatever. The obvious purpose of the "closely and substantially" clause is the inclusion within the coverage of the Act of those repairmen and maintenance personnel who, in the absence of the Amendment would have been barred from recovery because their injury occurred while they were repairing or servicing a "dead" locomotive or an intrastate train.

To summarize: the language of the second paragraph of the 1939 Amendment to Section 1 of the Act permits only one explanation of the congressional purpose. The "moment of injury" rule was intended to be eliminated with respect to all classes of employees who, under the earlier decisions of this Court interpreting the Act, had been included within its provisions. Thus, the three groups which fell within the earlier rulings were covered in the following manner:

a. within the "furtherance" of transportation clause, those actively engaged in moving the equipment of transportation;

b. within the "directly" clause, the non-operating personnel who were immediately concerned with the movement of transportation; and

c. within the "closely and substantially" clause, the non-operating personnel who kept the instrumentalities of transportation—trains, tracks and roadbeds—maintained and in repair.

Transportation is the center of three concentric circles surrounding, respectively, each of the three groups. The second clause and its circle (yardmen) are farther from transportation than the first circle (the crews of the trains). The third circle (maintenance and repairmen) is still further removed from transportation than is the second. Outside the final circle—the dividing line between those who are

and those who are not included within the coverage of the Act—lie those no part of whose duties substantially and closely affect interstate transportation.

If, as petitioner contends, virtually all railroad employees were brought within the Act by the "furtherance" clause, the section as a whole would be redundant. All that precedes it and all that follows it would be unexplainable. In effect, the first paragraph limiting coverage to transportation workers would be repealed although reenacted. The words which follow, "directly or closely and substantially affecting commerce", would add nothing since there would be no employees not already covered. Why should Congress indulge in such meaningless circumlocution if in fact its purpose was to make the Act apply to all employees of an interstate carrier? That result, if intended, would easily have been accomplished by merely eliminating the phrase "in such commerce" from the following clause in the first paragraph:

> "shall be liable in damages to any person suffering injury while he is employed by such carrier *in such commerce*" (Emphasis supplied.)

and the whole second paragraph would have been entirely unnecessary.

### 5. The Language of the Amendment in the Light of Other Legislation Based on the Commerce Power.

In essence, petitioner contends that the Court must find in the language of the Amendment an intention on the part of Congress to reach out and embrace railroad employees who are not transportation workers including those who are solely engaged in intrastate and local activities. There is no doubt whatever that Congress could have brought such employees within the Act had it so intended. It is equally clear that Congress did not so intend and was not attempting to explore how far it might go to enlarge the coverage of the Act.

A review of earlier railroad legislation shows that at the time of the adoption of the Amendment, Congress was aware of its power to regulate intrastate employees and that when so minded it expressed its intention in language which made clear the all-embracing character of the scope of the particular Act. Furthermore, an examination of the provisions of other federal enactments during the years immediately preceding the adoption of the Amendment reveals the marked difference between the phraseology of the Amendment and the language used by Congress when it actually sought to exercise the full measure of its power under the commerce clause.

*Federal Statutes Regulating Railroads.*

In the earlier statutes which regulated the employer-employee relationship in transportation, Congress had veered between a broad coverage of employees in some and a narrow coverage in others. In each case, however, the language showed whether all or a limited group were to be within the Act. In the Employers' Liability Act of 1906, Congress provided that "every common carrier . . . shall be liable to any of its employés". The 1908 Act cut liability down to "to any person suffering injury while he is employed by such carrier in such (interstate) commerce".[33] The Adamson Law,[34] enacted in 1907, applied only to employees "actually engaged in or connected with the movement of any train". In the field of labor regulation, the Erdman Act [35] of 1898, applied to "any person seeking employment" or "any employee", and was declared unconstitutional in *Adair v. U. S.*, 208 U. S. 161 (1902). Conse-

33. This Court noted, prior to the adoption of the 1939 Amendment, that the Employers' Liability Act did not exhaust the limits of the congressional power under the commerce clause. *Illinois Central R. R. v. Behrens*, 233 U. S. 473, 477 (1914).

34. Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U. S. C. § 61.

35. Act of June 1, 1898, c. 370, 30 Stat. 424.

quently in the Railway Labor Act of 1926, as amended,[36] the term "employee" was limited to persons performing "work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission". The first Railroad Retirement Act of 1934[37] applied to employees of any carrier on the date of passage of the Act as well as those who later became employees or had been employed one year prior to that date. It, likewise, was declared unconstitutional, *Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935), but the opinion of the Court made it perfectly clear that Congress had the power to regulate all railroad employees.[38] In consequence a new Railroad Retirement Act was adopted in 1937[39] and defined "employee", inter alia, as "any individual in the service of one or more employers for compensation" and "employer" as "any carrier". Equally broad definitions are found in the Railroad Unemployment Insurance Act, adopted in 1938.[40]

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36. Act of May 20, 1926, c. 347, § 1, 44 Stat. 577, as amended, June 7, 1934, c. 426, 48 Stat. 926, June 21, 1934, c. 691, 48 Stat. 1185, June 25, 1936, c. 804, 49 Stat. 1921, 45 U. S. C. § 151.

37. Act of June 27, 1934, 50 Stat. 307.

38. The Court said, at pages 369-370 of the *Alton* opinion:

"In the absence of a rule applicable to all engaged in interstate transportation the right of recovery for injury or death of an employee may vary depending upon the applicable state law. That Congress may, under the commerce power, prescribe an uniform rule of liability and a remedy uniformly available to all those so engaged, is not open to doubt. . . . In dealing with the situation it is permissible to substitute a new remedy for the common-law right of action; to deprive the employer of common-law defenses and substitute a fixed and reasonable compensation commuted to the degree of injury; to replace uncertainty and protracted litigation with certainty and celerity of payment; to eliminate waste; and to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems."

39. Act of June 24, 1937, 50 Stat. 307, 45 U. S. C. § 228.

40. Act of June 25, 1938, c. 680, 52 Stat. 1094, 42 U. S. C. §§ 503, 1104, 1107, 45 U. S. C. §§ 351-363, 364, 366, 367.

Thus Congress had on occasion made the legislation apply to all employees at one extreme and to train crews only, at the other. In the 1939 Amendment, it was redefining the coverage to include an intermediate group: transportation workers and those closely related to the instrumentalities of transportation. It is inescapable that if Congress had intended the Act to apply to all employees, it would have said so in so many words. Whatever doubts there may have been at some earlier date as to its power to include all employees within the FELA, such doubts had been fully dispelled by 1939. In the light of its experience with the Railroad Retirement Act and this Court's decision in the *Alton* case, it is impossible to explain the language of the 1939 Amendment as an exploratory attempt by Congress to cover such employees as might fall within its constitutional power of regulation.

The legislation which in all other respects is most closely analogous to the FELA is the Jones Act,[41] adopted in 1915. That law applies to "any seaman who shall suffer personal injury in the course of his employment", and if Congress had intended to make the 1939 Amendment equally broad it could have done so in precisely the same way. It retained the phrase "in such commerce", however, and with that provision still there, the FELA cannot be given the same broad coverage as that extended to seamen under the Jones Act.

*Other Contemporary Legislation.*

During the decade of the nineteen thirties, Congress, in asserting its broad powers under the commerce clause, used two legislative devices to make clear its intentions as to the coverage of a particular act. The first was the inclusion of an introductory statement of policy to show

41. Act of March 4, 1915, c. 153, § 20, 38 Stat. 1185, as amended, Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 U. S. C. § 688. Held constitutional: *Panama R. Co. v. Johnson*, 264 U. S. 375 (1924).

that it was seeking to regulate matters which might previously have been considered as falling within the realm of state regulation. Illustrations of such policy declarations are found in the Securities Exchange Act of 1934,[42] the Interstate Transportation of Petroleum Products Act of 1935,[43] the Public Utility Holding Company Act of 1935,[44] the Bituminous Coal Act of 1937,[45] the Natural Gas Act of 1938,[46] and the Fair Labor Standards Act of 1938.[47] No one could doubt that Congress intended to extend its power to regulate labor relations so as to include industrial employees within the scope of the National Labor Relations Act.[48] Repeated reference to "industry" in the declaration of policy made that intention clear.

The second device was the adoption of an all-embracing definition for the word, "commerce", or the term, "affecting commerce", and in the Fair Labor Standards Act and the National Labor Relations Act, the use of such broad definitions provided clear guides to the breadth of their intended coverage. The impact of the FLSA on the wages and hours of employees in industry and other activi-

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42. Act of June 6, 1934, c. 404, 48 Stat. 881, 15 U. S. C. 77.

43. Act of Feb. 22, 1935, c. 18, 49 Stat. 30, 15 U. S. C. 715-715k.

44. Act of Aug. 26, 1935, c. 687, Tit. I, 49 Stat. 803, 15 U. S. C. 79 to 79-6.

45. Act of April 26, 1937, c. 127, § 1, 50 Stat. 75, 15 U. S. C. § 828.

46. Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U. S. C. §§ 717-717w.

47. Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. § 201.

48. The Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. § 151 empowered the N. L. R. B. to prevent any person from engaging in any unfair practice "affecting commerce". "Affecting commerce" was defined as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a dispute burdening or obstructing commerce or the free flow of commerce." This Act was held to be constitutional in *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

ties formerly considered local arises very largely from the fact that Congress specifically made it apply to employees "engaged in commerce or in the production of goods for commerce" and defined those words in the broadest terms.[49]

The amended FELA, however, has no declaration of policy and no new definition of the terms "commerce" or "affecting commerce" to indicate the intention of Congress to bring all employees within the Act. The terms "directly" and "closely and substantially" were probably derived from the case of *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453 (1938). Therein the Court sustained the authority of the Board over a local fruit packing cannery which was essentially local though 37% of its total "pack" was shipped into interstate or foreign commerce. The Court said at pages 466-467:

> "To express this essential distinction, 'direct' has been contrasted with 'indirect', and what is 'remote' or 'distant' with what is 'close and substantial'. Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce', 'due process', 'equal protection'. In maintaining the balance of the constitutional grants and limitation, it is inevitable that we should define their

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49. "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." 29 U. S. C. § 203 (b).

"'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods or in any process or occupation necessary to the production thereof, in any State." 29 U. S. C. § 203 (j).

applications in the gradual process of inclusion and exclusion."

While it is true that the *Santa Cruz* case established that effects upon commerce which were "direct" or "close and substantial" could be regulated by Congress, there is nothing in the opinion which would warrant the inference that those words provided a magic formula which meant that their mere use would bring all employees within the scope of an act. To the contrary the question of coverage was held to rest "in the gradual process of inclusion and exclusion".

In the light of the whole legislative background, the language of the 1939 Amendment is not obscure. The elimination of the "moment of injury" rule was carefully spelled out. It resulted in an inclusion within the Act of certain employees, a part of whose duties carried them into intrastate transportation. Congress, which in 1939 still had fresh in mind the fate of some of the early legislation of the Roosevelt administration, sought to avoid the danger that the whole new provision might be rendered unconstitutional because of the failure to show that there was a relationship between such employees and interstate commerce. It dealt with that possibility not by bringing within the Act all railroad employees and asserting that all of them affected commerce, for that was not its intention. It merely showed that those whom it did intend to cover were within the commerce power since their duties did affect commerce either directly or closely and substantially.

In placing a meaning on the clauses in question, sight should not be lost of the fundamental fact that the Act is dealing only with employees engaged in interstate transportation. The purpose of the language employed was both inclusive and exclusive,[50] and there is no room for

50. As in the case of the FLSA, the scope of the 1939 amendment to the FELA was not extended to the limits of Congressional power. See, for example, Justice Frankfurter in *A. B. Kirschbaum*

inference that the real purpose of Congress was to bring within the coverage of the Act employees whose duties were local and intrastate and had no relationship to transportation.[51] For such employees, this Act was not designed.

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*Co. v. Walling*, 316 U. S. 517, 523 (1942), and Justice Douglas in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570 (1943). The problem in the present case is also, like that in FLSA cases, one of "delineation," not "constitutional power". See *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 89-90 (1942).

51. The words of this Court in *10 East 40th St. Co. v. Callus*, 325 U. S. 578, 582 (1945) (holding that an employee was not encompassed by the FLSA), with the interlineations suggested in parentheses, resolve the issue in the present case:

> ". . . merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods," (a movement by rail in interstate transportation) "does not bring it within the scope of the Fair Labor Standards Act." (Federal Employers' Liability Act) ". . . we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

Compare the test suggested in the "Brief for Petitioner" at pages 20-21:

> "In its discussion of the facts of this case, the majority of the Court of Appeals excludes petitioner from coverage under the 1939 Amendment by linking her status with that of a 'messenger boy' at the end of a 'dire chain of catastrophe' and remarking 'One is reminded of the old rhyme "for want of a nail the shoe was lost"' (at p. 813)."
>
> "It is petitioner's position that indeed such a chain is involved here as in all such FELA cases, and it is to this that a Court must look in testing for applicability of the 1939 Amendment."

And at page 23:

> ". . . Without the prints new or extra parts cannot be made. Old ones cannot properly be repaired. The system would grind to a halt, a conclusion in no wise vitiated by the majority's characterization of such a cessation as 'dismal' (at page 813)."

## C. The Federal and State Decisions Since the 1939 Amendment.

Petitioner ignores the long series of decisions by this Court interpreting the 1908 Act, suggests that the legislative history is "completely useless" [52] in resolving the issue presented in the case at bar, and argues that various federal and state decisions since the Amendment support the proposition that employees engaged in intrastate or local activities are encompassed within the broadened scope of the FELA coverage.

The cases which have been decided since 1939 are, however, in harmony with an interpretation which credits the Amendment of Section 1 with no greater impact on the coverage of the Act than the elimination of the "moment of injury" rule. No case (other than the *Southern Pacific* cases now pending before this Court) has been found in which recovery has been permitted if the employee's general duties did not fall within the three classes to which the Act had been applied prior to the Amendment. Several cases have suggested that the language of the Amendment has broadened the Act's coverage beyond the mere elimination of the "moment of injury" rule but the pronouncements to that effect have been purely dicta.

### *The Circuit Court Cases.*

Six Circuit Court decisions have held that the railroad employees involved were covered by the Act as amended in 1939. Not one of them is authority for a holding that the petitioner is covered in the case at bar or is inconsistent with the interpretation which is asserted in this brief.

*Edwards v. Baltimore & Ohio R. R. Co.*, 131 F. 2d 366 (7th Cir. 1942) involved a machinist's helper who was repairing a stoker in a locomotive which was temporarily out of interstate service. The worker in *Shelton v. Thomson*, 148 F. 2d 1 (7th Cir. 1945) was employed in the railroad's

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52. Brief for Petitioner, p. 7.

storehouse operating a crane which hoisted car wheels and other equipment into position during a stage in the repair of freight cars. In *Southern Pacific Co. v. Libbey*, 199 F. 2d 341 (9th Cir. 1952) the plaintiff, a student fireman, was injured when he jumped from a locomotive cab because of a flashback fire. Plaintiff in *Robinson v. Pennsylvania R. R. Co.*, 214 F. 2d 798 (3rd Cir. 1954) was a carpenter engaged in the repair of a bridge under which interstate rail traffic moved. In *Peresiptka v. Elgin, J. & E. Ry. Co.*, 217 F. 2d 182 (7th Cir. 1954) the plaintiff was engaged in assisting the work of car repairmen.[53]

Petitioner contends that *Straub v. Reading Co.*, 220 F. 2d 177 (3rd Cir. 1955) strongly supports recovery in the case at bar. The plaintiff was an assistant timekeeper who supervised the railroad's timekeeping system and saw that the men who operated the trains were properly paid and were not allowed to work more than 16 consecutive hours. His duties were described by his counsel (likewise counsel for petitioner in the case at bar) at pages 16-17 of his brief in the Court of Appeals as follows:

> "Certainly, Mr. Straub, whose supervisory work takes him into four states in which he is actually counting equipment in actual movement or making out time sheets for the men who are in actual movements and checking on their whereabouts, is acting in furtherance of or substantially affecting the interstate character of the operations."[54]

The question of whether the plaintiff was within the Federal Employers' Liability Act was not raised in *Thomas*

53. *Libbey* involved a railroad employee of the first category always included under the Act (moving equipment). *Edwards, Shelton, Robinson* and *Peresiptka* involved employees always encompassed under the third category—repair and maintenance men.

54 These duties would place *Straub* in the second category of employees along with the other yardmen even though a substantial part of his duties were performed in an office building. Mrs. Reed's duties never took her off the fifth floor of an office building.

*v. Union R. Co.*, 216 F. 2d 18 (6th Cir. 1954), and was not mentioned in the opinion. While petitioner apparently assumes that the plaintiff was a white-collar worker (Brief for Petitioner, page 14) all that appears in the opinion is that plaintiff, a railroad employee, fell while "leaving his office and stepping from the porch thereof onto the concrete floor of a roundhouse" and that there was evidence of a dangerous condition "near the foreman's office, in the roundhouse" (page 19). On that meager information it would appear that Thomas' roundhouse duties involved instrumentalities of transportation and that he was therefore within the coverage of the Act.

*The District Court Cases.*

Since 1939, seven district court cases have discussed the question of coverage. In the five cases where the employee was held to be within the Federal Act,[55] he would likewise have been covered prior to the Amendment providing there was no difficulty under the "moment of injury" rule. In one case a new trial was ordered because the record was not complete as to the nature of the plaintiff's duties.[56]

In the seventh case, *Holl v. Southern Pac. R. Co.*, 71 F. Supp. 21 (N. D. Cal. 1947), the employee was an assistant distribution clerk in the freight claim department, whose sole duty was to write on a form the route over which

55. *Erwin v. Pennsylvania R. R.*, 36 F. Supp. 936 (E. D. N. Y. 1941) (brakeman working as a member of a shifting crew); *Agostino v. Pennsylvania R. R.*, 50 F. Supp. 726 (E. D. N. Y. 1943) (trackman spreading ballast); *Patzaw v. Kansas City Southern Ry.*, 56 F. Supp. 897 (W. D. La. 1944) (section crew member employed in repair of tracks); *Zimmerman v. Scandrett*, 57 F. Supp. 799 (E. D. Wis. 1944) (member of a crew performing maintenance and repair work in a roundhouse); and *Brainard v. Atchison, Topeka & Santa Fe Ry.*, 87 F. Supp. 921 (Kan. 1950) (machinist's helper working on the assembly of switches).

56. *Shoenfelt v. Pennsylvania R. R.*, 69 F. Supp. 728 (S. D. N. Y. 1947) (powerhouse employee in a car repair shop).

freight, on which a claim for loss or damage was being made, had traveled. It was held that plaintiff's duties did not bring her under the Federal Act. The Court said at pages 23-24:

> "If she comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. And so, for that matter, does every other clerical employee in the department. I do not think that it was the intention of the Congress to include such employees and to withdraw them from the protection of State Employers' Liability Laws. On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in such commerce'*. This would have extended the Act to 'any person suffering injury while he is employed by such carrier', and would have placed *all employees of interstate railroads under the Act*, whether their work be clerical or not, or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier*. This it could have done constitutionally even if it had included employees and activities clearly local and intrastate." (Citing cases.)
>
> "But the Congress did not do so. And I do not find in the cases which have arisen under the amendment any judicial sanction for doing it by interpretation." (Emphasis by the Court.)

*The State Cases.*

The numerous decisions of the various state courts involving the applicability of the state and federal act to injured railroad employees are also consistent with the decision of the Third Circuit in the case at bar. Where the Court has ruled that the employee was within the coverage of the FELA, the duties of the injured man have almost

invariably brought him within one of the three general categories of employees who recovered under the Federal Act prior to 1939, i.e., the trainmen, yardmen and repairmen. A brief reference may be made to the type of railroad men who were involved, since, among them, clerical workers, or anyone else who could be equated to Mrs. Reed, are conspicuous by their absence.

Falling into the first category are those such as firemen,[57] brakemen,[58] and conductors,[59] operating personnel who were, of course, always covered by the Federal Act.

Non-operating personnel falling within the second category such as switchmen,[60] guards on the right-of-way,[61] signalmen,[62] oilers[63] and yardmen,[64] have been held to be covered by the Act since 1939, as they were before.

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57. *Murphy v. Boston & Maine R. R.*, 319 Mass. 413, 65 N. E. 2d 923 (1946); *Louisville & N. R. R. v. Potts*, 178 Tenn. 425, 158 S. W. 2d 729 (1942); *Louisville & N. R. R. v. Stephens*, 298 Ky. 328, 182 S. W. 2d 447 (1944).

58. *Taylor v. Lumaghi*, 352 Mo. 1212, 181 S. W. 2d 536 (1944); *Ford v. Louisville & N. R. R.*, 355 Mo. 362, 196 S. W. 2d 163 (1946); *Pritt v. W. Virginia Northern R. R.*, 132 W. Va. 184, 51 S. E. 2d 105 (1948); *Beam v. Baltimore & O. R. R.*, 77 Oh. St. 419, 68 N. E. 2d 159 (1945); *Lewis v. I. A. C.*, 19 Cal. 2d 284, 120 P. 2d 886 (1942).

59. *Griffith v. Gardner*, 358 Miss. 859, 217 S. W. 2d 519 (1949); *Ernhart v. Elgin*, 337 Ill. App. 56, 84 N. E. 2d 868 (1949), aff., 405 Ill. 577, 92 N. E. 2d 96 (1950); *Pauly v. McCarthy*, 109 Utah 398, 166 P. 2d 501 (1946), rev., 330 U. S. 802 (1946).

60. *Rodgers v. N. York C. & St. Louis R. R.*, 328 Ill. App. 123, 65 N. E. 2d 243 (1946); *McCall v. Pitcairn*, 232 Iowa 867, 6 N. W. 2d 415 (1942); *Southern Pac. v. I. A. C.*, 19 Cal. 2d 281, 120 P. 2d 887 (1942).

61. *Baltimore & O. R. R. v. Rodheaver*, 197 Md. 632, 81 A. 2d 63 (1951); *Albright v. P. R. R.*, 183 Md. 421, 37 A. 2d 870 (1944), cert. den., 323 U. S. 735 (1944).

62. *Scarborough v. Pennsylvania R. R.*, 154 Pa. Super. 129, 35 A. 2d 603 (1944).

63. *McFadden v. Pennsylvania R. R.*, 130 N. J. L. 601, 34 A. 2d 221 (1943).

64. *McGuigan v. Southern Pac.*, 112 Cal. App. 2d 704, 247 P. 2d 415 (1952).

And non-operating personnel maintaining and repairing the instrumentalities such as the right-of-way workers,[65] and those repairing cars, locomotives and other equipment[66] have likewise been held to be covered by the Act.

As in any area of the law where lines must be drawn on the basis of degree there are, of course, border-line cases. Petitioner cites four such decisions in the "Brief for Petitioner".

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65. *Prader v. Pennsylvania R. R.*, 113 Ind. App. 518, 49 N. E. 2d 387 (1943); *Skanks v. Union Pac. R. R.*, 155 Kan. 584, 127 P. 2d 431 (1942); *Atlantic Coast Line v. Meeks*, 30 Tenn. App. 530, 208 S. W. 2d 355 (1947); *Rainwater v. Chi., R. I. & P. Ry.*, 207 La. 681, 21 So. 2d 872 (1945); *Missouri Pacific R. R. v. Fisher*, 206 Ark. 705, 139 S. W. 2d 552 (1940); *Piggue v. Baldwin*, 154 Kan. 708, 121 P. 2d 183 (1942); *Illinois Central R. R. v. Industrial Comm.*, 414 Ill. 546, 111 N. E. 2d 590 (1953); *Riley v. West Virginia Northern R. R.*, 132 W. Va. 208, 51 S. E. 2d 119 (1948); *Walden v. Chi. & N. W. Ry.*, 411 Ill. 378, 104 N. E. 2d 240 (1952); *Southern Pac. R. R. v. Romine*, 75 Ariz. 98, 251 P. 2d 908 (1953); *Copley v. I. A. C.*, 19 Cal. 2d 287, 120 P. 2d 879 (1942), cert. den., 316 U. S. 678 (1942); *St. Louis-San Francisco Ry. v. Wacaster*, 210 Ark. 1080, 199 S. W. 2d 948 (1947).

66. *Wills v. Terminal R. Ass'n of St. Louis*, 239 Mo. App. 1144, 205 S. W. 2d 942 (1947); *Deckert v. Chi. & Eastern R. R.*, 4 Ill. App. 2d 483, 124 N. E. 2d 372 (1955); *Harris v. Missouri Pacific R. R.*, 158 Kan. 679, 149 P. 2d 342 (1944); *Williams v. Chi. R. I. & P. Ry.*, 155 Kan. 813, 130 P. 2d 596 (1942); *Maxie v. Gulf M. & O. R. R.*, 356 Mo. 633, 202 S. W. 2d 904 (1949). 358 Mo. 1100, 219 S. W. 2d 322; *Armstrong v. M. K. T. R. R. of Texas*, 233 S. W. 2d 942 (Texas Civ. App. 1950), cert. den., 342 U. S. 837 (1951); *Wheeler v. M. K. T. R. R.*, 205 S. W. 2d 906 (Mo. 1947); *Southern Pac. R. R. v. Industrial Acc. Comm.*, 88 Cal. App. 569, 199 P. 2d 364 (1948); *Baird v. N. Y. Cent. R. R.*, 299 N. Y. 213, 86 N. E. 2d 567 (1949); *Wright v. N. Y. Cent. R. R.*, 33 N. Y. S. 2d 531 (1942); *Great Northern Ry. v. Industrial Comm.*, 245 Wis. 375, 14 N. W. 2d 152 (1944); *Jordan v. Baltimore & Ohio R. R.*, 135 W. Va. 183, 62 S. E. 2d 806 (1950); *Bailey v. Central Vermont Ry.*, 113 Vt. 433, 35 A. 2d 365 (1944); *Trucco v. Erie R. R.*, 353 Pa. 320, 45 A. 2d 20 (1946), cert. den., 328 U. S. 843 (1946); *Southern Pac. R. R. v. I. A. C.*, 19 Cal. 2d 283, 120 P. 2d 888 (1942); *Downs v. Baltimore & Ohio R. R.*, 345 Ill. App. 118, 102 N. E. 2d 537 (1952).

It is not necessary to analyze the factual situations in these cases or to argue whether they were correctly or incorrectly decided. It should be noted, first, that while they have frequently been referred to as "border-line" cases, that adjective when used in that connection does not bear the same meaning as when used by the proponents of the 1939 Amendment. At that time the "border-line" cases involved men who worked on interstate and intrastate instrumentalities and were denied recovery if on intrastate work at the time of their injuries.

In the second place, the over-all duties of the claimants in those cases brought them to the stations, yards, tracks or equipment of the railroad during the course of their duties, and hence they shared, at least to some degree, the special hazards of the railroad industry. Thus in *Bowers*,[67] the plaintiff was a messenger who carried waybills, which formed an indispensable part of every freight shipment, to the freight agent in the immediate vicinity of the freight. In *Ericksen*,[68] a lumber inspector was injured while inspecting ties that were being loaded into a freight car standing alongside a dock. *Harris*[69] involved a shop employee who among other things serviced the fires in locomotives. In *Jordan*[70] plaintiff was a carpenter whose duties included the repair of bridges and other instrumentalities. All of these cases have little bearing on the rights of an employee whose activities never touched any form of transportation whatever.

There are likewise "border-line" cases which have held that the injured employee's remedy was under state

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67. *Bowers v. Wabash R. R.*, 246 S. W. 2d 535 (Mo. App. 1952).

68. *Ericksen v. Southern Pacific R. R.*, 39 Cal. 2d 374, 246 P. 2d 642 (1952), cert. denied, 344 U. S. 897 (1952).

69. *Harris v. Missouri Pac. R. R.*, 158 Kan. 679, 149 P. 2d 342 (1944).

70. *Jordan v. Baltimore and Ohio R. R.*, 135 W. Va. 183, 62 S. E. 2d 806 (1950).

rather than federal law. *Thompson v. Industrial Commission*, 380 Ill. 386, 44 N. E. 2d 19 (1942), cert. denied, 318 U. S. 755 (1943) (a watchman employed to protect the railroad premises against trespassing and thievery); *Lawrence v. Rutland Railroad Co.*, 112 Vt. 523, 28 A. 2d 488 (1942), cert. denied, 317 U. S. 693 (1943) (a railroad employee who was injured while cutting weeds along the side of the roadbed); *Boyleston v. Southern Ry. Co.*, 211 S. C. 232, 44 S. E. 2d 537 (1947) (a laborer at a freight station); *Moser v. Union Pacific R. Co.*, 65 Idaho 479, 147 P. 2d 336 (1944) (a laborer in construction of new track).

*The Supreme Court Cases.*

While a number of cases in this Court have arisen under the 1939 Amendment, none has specifically involved the subject of its coverage. It is, of course, true that the approach to the interpretation of the Act has changed greatly in the last seventeen years and that, under recent decisions, the legislation has been interpreted in a spirit of liberality toward the injured employee.[71] It is one thing to interpret the Act in a generous and humane manner for the benefit of those who face the hazards of the railroad industry, and quite another to expand it to include employees who were never intended by Congress to be taken away from the coverage of state legislation.[72]

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71. See, for example, *Lavender v. Kurn*, 327 U. S. 645 (1946).

72. Petitioner has made no effort to document its assertion (Brief for the Petitioner, p. 6) that the decision of the Court below will "distort the application of the Amendment by excising from its coverage great numbers of carrier employees such as petitioner who until now have properly been held to be comprehended by the statute". To the contrary, such employees have always been regarded as within the compensation acts of the states and this appeal constitutes an effort on the part of petitioner to "excise" them from the coverage of state law. The only reported case dealing with an attempt to bring clerical employees within the FELA is *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (N. D. Cal. 1947) and that attempt was entirely unsuccessful.

There are two decisions in this Court which clearly demonstrate that the FELA does not cover all railroad employees. *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187, 190 (1952) involved an effort to broaden the coverage of the Jones Act on the theory that the 1939 Amendment to the FELA extended the scope of the Jones Act to employees not "seamen". In rejecting that construction, the Court stated that the 1939 Amendment "merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee' to include *certain* persons not theretofore covered because they were not directly engaged in interstate or foreign commerce". (Emphasis supplied.)

Shortly thereafter, in *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334 (1953), there was a direct ruling that the 1939 Amendment did not have the effect of making the FELA the exclusive remedy of all railroad employees. O'Rourke was a brakeman who was injured while working on a car float in navigable waters. The Court held that he could not recover under the FELA and that his sole remedy rested under the Longshoremen's and Harbor Workers' Compensation Act.[73]

Petitioner has cited three decisions of this Court in setting forth her position. *Lillie v. Thompson*, 332 U. S. 459 (1947) does not support a contention that there is FELA coverage for clerical workers. In the first place, an examination of the record in the case indicates that the defendant did not controvert in its answer the plaintiff's assertion of interstate commerce and the Court specifically noted that it was not passing on the issue of coverage. Secondly, the claimant's duties were "to receive and deliver messages to men operating trains in the yards" (page 461). She was not in any sense a clerical worker but a yard clerk and her duties carried her into direct contact with trains and tracks. Mrs. Reed, in the case at bar, worked in an

73. Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. § 901; June 24, 1948, c. 623, §§ 1-5, 62 Stat. 602, 33 U. S. C. § 906.

office building and her duties had no relationship whatever to interstate transportation.

Petitioner also relies upon the decision of this Court in *Overstreet v. North Shore Corp.*, 318 U. S. 125 (1943), where employees who operated and maintained an interstate toll bridge were held to be covered by the Fair Labor Standards Act.

While this Court has on occasion cited FELA decisions in opinions dealing with the FLSA, it has repeatedly noted that the coverage of the two acts is not co-extensive and that cases under one do not necessarily constitute precedents under the other. The FLSA applies to employees engaged in interstate commerce and those engaged in the production of goods for commerce. The latter provision gives the FLSA a very broad sweep in regard to local activities and provides the basis for a real difference in the coverage of the two acts. In earlier cases the Court appeared to give the term "engaged in commerce" in the FLSA a narrower interpretation than the corresponding provision of the FELA.[74] Recent decisions of this Court appear to depart from that view, but, because of the "production of goods for commerce" clause of the FLSA, there was never doubt that the overall coverage of the FLSA was much broader than that of the FELA.

Petitioner refers to the *Overstreet* case, without pointing out that it arose under the FLSA, and suggests that it poses a "simple, direct and workable test":

> "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?"[75]

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74. Thus, a cook on a camp car used for feeding and housing workers engaged in commerce was held within the FELA long before the Amendment, *Phila., B. & W. R. Co. v. Smith*, 250 U. S. 101 (1919); whereas in *McLeod v. Threlkeld*, 319 U. S. 491 (1943), the court refused to hold that an employee with similar duties was within the FLSA.

75. Brief for the Petitioner, p. 23.

But *Overstreet* involved an employee who controlled a drawbridge which was an artery of interstate commerce and which was over navigable waters that were likewise such an artery. The Court applied the rule of *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146 (1913) which involved a railroad worker who was injured while carrying bolts to repair a railroad bridge and in referring to that case said at page 129:

> "It was pointed out that tracks and bridges were indispensable to interstate commerce and 'that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it.'"

Obviously, the duties of such bridgeman would directly affect interstate commerce, and the failure to perform them would "impede" commerce and, in fact, bring it to a standstill. If a railroad worker, he would have been covered by the FELA, as well as the FLSA, both before and after 1939.

The only other Supreme Court decision cited by petitioner in support of her position is *Bailey v. Central Vermont Ry., Inc.*, 319 U. S. 350 (1943). It is included among a list of 21 cases supposedly involving "back shop" workers although that case did not present the question of the scope of the Act and involved a trackman whose coverage was not in dispute. Petitioner, however, suggests that the "back shop" cases are an illustration of the "great broadening of the FELA" accomplished by the Amendment and can only be explained by the "expanded ambit of the statute".[76]

In *Virginian Ry. Co. v. Federation*, 300 U. S. 515, 556 (1937), the Court had already stated that the activities of back shop employees have such a close relation to the interstate activities of a railroad that they are to be regarded

76. Brief for the Petitioner, pp. 14-15.

as a part of them, at least for the purposes of the Railway Labor Act.[77] Prior to 1939, however, a back shop employee injured while engaged in repairing an instrumentality of transportation, removed from service, was not covered by the FELA because at the moment of his injury the equipment on which he was working was not in transportation. A back shop employee engaged in new construction was not engaged in transportation work at all and for that reason was not covered. The 1939 Amendment eliminated the moment of injury test so that the former group, those repairing transportation equipment temporarily at rest, are now covered. The latter group, those engaged in new construction, are unaffected by the Amendment since it was not the moment of injury rule which had excluded them from coverage prior to 1939 and there was no indication in the Amendment that Congress intended to bring them within the Act.

It is this latter question which is raised in the *Southern Pacific* cases now pending before this Court. Respondent respectfully submits that those cases were wrongly decided by the Supreme Court of California. The employees there involved were not working on dead engines but on the construction of new cars (*Gilco*, *Eufrazia* and *Eelk*), wheels for stockpiling (*Aranda*) and the installation of retarders in the construction of a new yard (*Moreno*). No part of the duties of these workmen was in furtherance of interstate transportation nor did any part directly or closely and substantially affect such transportation. Any effect which they had upon it was no different from that which would have resulted from the efforts of some outside manufacturer or contractor who might have performed the construction, and could only be regarded as remote.

The decision in *Mitchell v. C. W. Vollmer & Co., Inc.*, 349 U. S. 427 (1955), involving the FLSA, should not be

77. The "back shop" employees in the *Virginian* case were engaged in the repair of locomotives, and there was no evidence, in the opinion at least, that any of them were engaged in new construction.

considered as an intermediate step in a complete departure from the rule of the *White* [78] and *Raymond* [79] cases wherein it was held that employees engaged in "new construction" are not covered by the FELA. It is sufficient to point out that this Court clearly recognized the difference in coverage between the FLSA and the FELA in the opinion in the *Vollmer* case where the FELA was characterized as a "different act of another vintage" (p. 429).

To summarize the effect of the litigated cases since 1939: all of them are consistent with respondent's basic premise that only three general groups of employees fall within the coverage of the Act. They consist of the men who operate the carrier's equipment, those who directly affect the movement of the equipment and those who maintain or repair the instrumentalities of transportation. On the other hand, all employees whose duties are exclusively concerned with local and intrastate activities are no more to be found within the cases permitting recovery under the Act after the Amendment, than they were found within the ones decided prior to 1939.

There is no question that the decisions of this Court in the last seventeen years reflect the much wider coverage that the Act has had since the Amendment. The abolition of assumption of risk and the "moment of injury" rule broadened the scope of the Act materially, and the Court's decisions with regard to the submission of questions of negligence to the jury have likewise enabled many employees to recover who would not have done so in the earlier years. However, there is nothing in any of the decisions which would warrant the inclusion of clerical workers within the coverage of the Act. The wording of the Amendment, its background and subsequent interpretation, all militate against an extension of the meaning of the Act which would permit petitioner to recover in this proceeding.

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78. *New York C. Ry. v. White*, 243 U. S. 188 (1917).

79. *Raymond v. Chicago, M. & St. P. Ry.*, 243 U. S. 43 (1917).

## CONCLUSION.

The coverage of the FELA both before and after the 1939 Amendment has been extended to employees engaged in interstate transportation and to no others. Before the Amendment it was necessary to be engaged therein at the very moment of injury and the Amendment abolished that requirement. It did not go further and include employees whose activities had no close and substantial relationship to interstate transportation.

Once it is clear that the Act was not intended to embrace all railroad employees within the scope of its coverage, the fate of petitioner's FELA claim is no longer open to doubt. Her duties were purely clerical; she never had contact, physical or otherwise with any instrumentality of transportation; she faced only the hazards of file cabinets and other office furniture and the floors and windows of an office building. She typifies the employee whose activities are local and intrastate in character, for whom state compensation acts are expressly designed and who, because negligence need not be proved in order to permit recovery, is much better off with the remedies provided by local law.

The lower court had no jurisdiction of the subject matter of this litigation, and the case was properly dismissed. The judgment should be affirmed.

Respectfully submitted,

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